Transportation & Logistics

Q&A in Plain English

Books 4,5 & 6 - A Compilation

By
George Carl Pezold
and
Raymond A. Selvaggio

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INTRODUCTION

"Transportation & Logistics - Q&A in Plain English - Books 4, 5 & 6 is a compilation of the forth, fifth and sixth books in this series of the Council's popular texts that were originally published in 2004 through 2007 .

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 4, 5 & 6" 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.

ABOUT THE AUTHORS

GEORGE CARL PEZOLD

George Carl Pezold is admitted to practice as a member of the Bar of the State of New York, as well as numerous federal district and appeals courts. He holds a J.D. from New York University School of Law and an M.E. degree from Stevens Institute of Technology. He is the senior member of the firm of Pezold, Smith, Hirschmann & Selvaggio, LLC in Huntington, New York, concentrating in the areas of transportation and logistics.

Mr. Pezold is Executive Director of the Transportation & Logistics Council, Executive Director/General Counsel of the Freight Users Association of New York, and former General Counsel of the Long Island Import-Export Association. He is a member of The Maritime Lawyers Association, the Association of Transportation Law Professionals, National Association of Subrogation Professionals, and the state and local Bar Associations.

In addition to his extensive litigation background during the last forty years, Mr. Pezold is author of *Freight Claims in Plain English* (4th Ed. 2009), *Shipping & Receiving in Plain English - A Best Practices Guide* (T&LC 2010) and many other publications, has written numerous papers and articles, and is a frequent speaker at seminars and programs on transportation and logistics.

RAYMOND A. SELVAGGIO

Raymond A. Selvaggio is a member of the law firm of Pezold, Smith, Hirschmann & Selvaggio, LLC. Mr. Selvaggio's practice concentrates in litigation and transactional matters related to transportation and administrative law.

He holds a Juris Doctor degree from Brooklyn Law School and is a member of the Transportation Lawyers Association, as well as the New York State, Suffolk County and American Bar Associations. He is admitted to practice before the U.S. Supreme Court as well as several Circuit Courts of Appeal and Federal District Courts.

He is also General Counsel to the Transportation & Logistics Council, Inc.

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TABLE OF CONTENTS

Transportation & Logistics

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Books 4, 5 & 6 - A Compilation

1) ACCESSORIAL CHARGES – LIABILITY

Question: I was reading the recent issue of TRANSDIGEST last night and found an area of concern.

In the article on "Freight Charges - Who Pays Accessorial Charges" you refer to signing Section 7 of the bill of lading on prepaid shipments in order for shipper to avoid paying unwanted accessorial charges incurred by customers. The way I understand it is that Section 7 is designed only for "Collect" shipments and not prepaid shipments, therefore the shipper will be responsible for the accessorial charges even if section 7 is signed. It is stated on the bill of lading "for freight collect shipments". What a shipper should do is put that prepaid language in their contract with the carrier and shipper will be protected against paying accessorial charges. The only problem is that the carrier may not accept that language in their contract.

I'm not a lawyer so please clarify.

Answer: The language "For Freight Collect Shipments" was first added to the non-recourse section or "Section 7" of the Uniform Straight Bill of Lading effective December 27, 1997 (as a result of the Trucking Industry Regulatory Reform Act of 1994 and the ICC Termination Act of 1995, which essentially eliminated all tariff filing requirements), and was not there before that date.

The older court decisions dealing with Section 7 involve both prepaid and collect situations, and say that signing Section 7 on a prepaid bill of lading would insulate the shipper from any additional charges such as detention, re-delivery, etc. To the best of my knowledge there have been no decisions on this question since the new language was inserted in the 1997 version of the Uniform Straight Bill of Lading.

Naturally, if the shipper has a properly-drafted transportation agreement, or prepares its own bills of lading, this ambiguity can be corrected by including appropriate non-recourse language.

2) ACCESSORIAL CHARGES - RESPONSIBILITY FOR PAYMENT

Question: We have many less-than-truckload ("LTL") shipments that are arranged and shipped prepaid by our vendors. We then receive invoices from the LTL carriers for the accessorial charges (i.e. detention, sort & segregate and notification). When we notify the carrier that the shipment shipped prepaid and that we are not responsible for any portion of the freight charges, they claim that the shipper is only responsible for the freight charge (line haul charge) and the consignee is responsible for the accessorial. Is this correct?

Answer: The carrier may have a contract with the shipper that determines how destination accessorial charges will be billed, and I can understand how a shipper might balk at paying detention charges, etc. caused by its customer.

However, if the bill of lading is designated "prepaid" I believe that the shipper would still have primary liability for of the charges (line haul and accessorial charges), unless, of course the "non-recourse" section of the bill of lading was signed.

This is really something that you should work out with your vendors.

3) ACCIDENTS - WHO PAYS FOR CLEANUP?

Question: We are a carrier and we were hired to move a vanload. The driver was not permitted in the warehouse during the loading. The driver took the bill of lading, which he did not sign, and left the yard. When he was about one mile from the warehouse when as he attempted to merge onto the interstate ramp the load shifted.

The driver states at this point it was obvious that the load was loaded improperly. The consignee called a tow company to come to the site to clean up. There was no damage to the shipment, but the consignee is now requesting that we pay the fees for the clean up. Who should be liable for these costs?

Answer: The answer depends on the specific facts.

Federal safety regulations place the burden on the motor carrier to ensure that freight is properly loaded and secured. In other words, the primary responsibility is on the carrier and the driver is required to check the load. See 49 CFR 392.9.

The only exception would be if the shipper loaded the trailer and sealed it so that the driver had no opportunity to look inside. Even then, there could be a question as to whether the driver was negligent in operating the truck, e.g., going too fast around a turn, etc.

4) AIR FREIGHT - EXEMPT MOVEMENTS

Question: We have a local motor carrier that provides regional less-than-truckload ("LTL") service as well as airfreight cartage to and from O'Hare. Recently, they picked up an import shipment from Yusen Air in Wooddale, IL. Our terms on the purchase were CIF port of entry.

When the carrier delivered the shipment to our facility in Pleasant Prairie, WI, 2 skids fell off the trailer when they opened the doors. The carrier received the shipment from Yusen without exception.

The carrier does not dispute that they are liable, but insists that since this shipment originated as airfreight, it is subject to their limited liability of $.50 per pound or $50, whichever is greater. They maintain it is a continuation of the airfreight movement. The claim is over $9,600 and the weight of the damaged freight will give us a recovery of about $300 under their airfreight terms.

We are taking the position that since we routed this shipment via the motor carrier, they are not part of the airfreight or import process. We view it as simply an LTL shipment from Wooddale, IL to our facility and feel it should be governed by the terms of their LTL liability rules.

Do we have a leg to stand on?

Answer: The carrier is correct in that transportation with a prior or subsequent movement by air is generally exempt from the provisions of Title 49, Subtitle IV, Part B - which applies to motor carriers and includes the "Carmack Amendment" language (49 U.S.C. § 14706).

The relevant section is 49 U.S.C. § 13506(A)(8)(b) which exempts:

> (B) 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 or (to the extent so

> agreed by the United States and approved by the Secretary) by a foreign air carrier...

However, this is not the complete answer. Even for an "exempt" movement, federal common law establishes minimum standards for an enforceable limitation of liability. There must be adequate notice (usually on the face of the bill of lading or air waybill), an applicable tariff, a choice of rates (for full or limited liability), or an opportunity to declare a higher value and pay a valuation charge.

Thus, the answer to your question is fact-specific and I can't really give you a definitive answer without reviewing all of the relevant documents, tariffs, etc.

5) AIR FREIGHT - INTERNATIONAL SHIPMENTS

Question: I am involved in a claim with an international carrier. This carrier signed for freight and can not find it (lost). I filed a claim and they offered a payment based on no insured value. My question is "Is a faxed bill of lading with no terms and conditions, which are on the back, a legally binding document?" The reason I ask is the faxed copy was signed and given to driver for customs value only, as I was awaiting insured value from customer. Anyways I faxed an updated copy later but carrier says they never received fax and my fax machine does not print reports. They cut a check based on terms on the back side of a document that I never received. They are offering nothing more and I was told to make a business decision.

Any information you can give me would be extremely helpful in deciding to involve an attorney or cut my losses.

Answer: International air transportation is governed by one or more international treaties. These apply to the transportation of passengers and airfreight and have the force and effect of law. Whether a particular treaty applies to an airfreight shipment depends on whether the country of origin and the country of destination are both signatories to the same treaty.

Your shipment was from the United States to Australia.

These two countries are both parties to the Montreal Protocol No. 4, ("Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955"), which is generally referred to as "MP4". (See note below.)

Under MP4, the maximum liability of the air carrier is limited as follows:

"In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the consignor's actual interest in delivery at destination."

At the present time, 1 SDR is approximately equal to (U.S.) $1.44. Thus the maximum liability of the air carrier would be:

17 x $1.44 = $24.48 times the weight of your shipment (in kilograms).

Note: Although the United States is a party to the Montreal Convention of 1999 ("Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal 28 May 1999"), Australia has not yet ratified that convention.

6) AIR FREIGHT - LIABILITY LIMITATIONS

Question: We continue to run across subrogation cases involving damage to freight (both international and interstate) where, for example, a Wisconsin company orders some electronic

equipment from a Swiss company, and it is flown via Air France to O'Hare Airport in Chicago. There, a freight forwarder unloads it and arranges for an air freight company to pick it up and deliver it to the Wisconsin company. When it is delivered at the Wisconsin company, it is damaged, usually by the ground carrier who delivered it to the insured in Wisconsin. We present claims to the freight forwarder and the carrier and the air freight company, and they all say there is a tariff that limits liability to $5 per pound, that the claim should have been filed within 9 months under the Carmack Amendment, etc.

We are particularly interested in ways to get around the limitation of liability and the shortened statute of limitations, etc.

Answer: Regarding the fact pattern that you have mentioned, there is quite a bit of conflict in the court decisions when there is a loss on the domestic leg of an international air or ocean shipment. The cases usually turn on whether there is a through air waybill or multimodal bill of lading, whether the inland carrier issues a separate bill of lading, etc.

With air shipments, the Warsaw Convention or Montreal Convention of 1999 applies only "airport to airport", so the question is what liability regime applies to the domestic leg. Because of the exemption [49 U.S.C. § 13506(a)(8)(B)], "Carmack" doesn't automatically apply, so you usually end up with federal common law. Then you get into the issue of whether the carrier's liability limitation is enforceable (notice of liability limitation on the face of the bill of lading or incorporated by reference in an applicable tariff, choice of rates, etc.).

7) AIR FREIGHT CARRIERS – EXEMPT MOVEMENTS

Question: I own an air cartage company based is San Antonio, Texas and I have been operating as an "Intrastate Carrier" since 2000. Last week, one of my trucks was stopped by the Texas Dept. of Public Safety and they issued 2 citations – 1st was no logbook & 2nd was operating without authority. They shut us down for 10 hours.

I had 10 pallets on my truck (25,995 GVWR - 26 foot bobtail), the freight origin was PDX (Portland, Oregon) and the destination was SAT (San Antonio, Texas). The freight moved from PDX to SAT by air by an air carrier. My company was hired by a freight forwarder to pick-up the freight in SAT from the air carrier's dock and run a Hot Shot from San Antonio, Texas to Del Rio, Texas (150 Air Miles).

The Texas Dept. of Public Safety said I was in violation because the freight on the truck is considered interstate commerce because of the origin city-PDX Portland, Oregon. The freight forwarder is saying that it was an air/expedited shipment and all air/expedited shipments are deregulated and because I was operating as their agent I was covered as well.

My question is: If an air/expedited shipment originates in another state and its destination is SAT San Antonio, Texas per the air carrier bill of lading and I pick up the freight in SAT and deliver it in the state of Texas is it interstate commerce or intrastate commerce? Do air/expedited shipments have different rules as the freight forwarder has told me?

Answer: As to your first question, there is no doubt that the shipments you described were in "interstate" commerce, since the origin and destination were in different states. See Section 1.2 of *Freight Claims in Plain English* (3rd ed. 1995) for a thorough discussion of "interstate" vs. "intrastate" commerce.

The answer to the second question is in 49 U.S.C. § 13506(a)(8)(B) and (C), which provides an exemption for certain motor carrier transportation incidental to transportation by aircraft:

> Sec. 13506. Miscellaneous motor carrier transportation exemptions
>
> (a) IN GENERAL- Neither the Secretary nor the Board has jurisdiction under this part over—
>
> * * * * * * *

(B) 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 or (to the extent so agreed by the United States and approved by the Secretary) by a foreign air carrier; or

(C) transportation of property by motor vehicle in lieu of transportation by aircraft because of adverse weather conditions or mechanical failure of the aircraft or other causes due to circumstances beyond the control of the carrier or shipper;

I would note that there must actually be transportation "by air" for some portion of the movement and as such, it would appear that your shipment qualified for the exemption. Note that many so-called "air freight" movements travel solely by truck and never see an airport. These would NOT be within the exemption.

As a suggestion, you really should register as a for-hire motor common carrier with the Federal Motor Carrier Safety Administration ("FMCSA"). It is not expensive, and many shippers check first with the FMCSA Licensing & Insurance system to see if a carrier is legitimate before doing business with them. It would also avoid the possibility of operating illegally if you do occasionally handle surface-only interstate shipments.

8) BILLS OF LADING – A SHIPMENT WITH MULTIPLE LEGS

Question: I have a grinding operation in Gilmore City, IA that is 30 miles form my Fort Dodge, IA plant. I am shipping bulk material into the grinding operation, repackaging the material and then shipping the material from the grinding operation to the final destination, my customer. The question is does the bill of lading from the Gilmore City operation have to show the origin as Gilmore city or can it show the origin from Fort Dodge? It is an internal issue of getting the bill of ladings. I have responded that legally the bill of lading needs to show Gilmore City as the origin point. Am I correct?

Answer: It would appear that there are two separate movements (probably involving two different carriers) -- one from Fort Dodge to Gilmore City, and another from Gilmore City to the customer.

Each of these movements is under a separate contract of carriage, and a separate bill of lading for each "leg" would be issued by the carrier handling that movement. As you know, the bill of lading terms and conditions, and any applicable tariffs, constitute the contract of carriage and govern rates and charges, carrier liability for loss or damage, etc.

The federal regulations governing bills of lading is found at 49 CFR Part 373. The minimum requirements for a bill of lading are:

Section 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).

It would seem to me that a proper interpretation would require that the actual origin and destination points be shown on the bill of lading.

9) BILLS OF LADING – AS COMPARED TO DELIVERY RECEIPTS

Question: I have a question regarding bills of lading vs. delivery receipts. We are a freight forwarder and our customers issue bills of lading to carriers when they pick-up the freight and most of the time the carrier will have the consignee sign the bill of lading as a proof of delivery. My question is when carriers make their own delivery receipts showing their company information and omitting ours is there anything I could do to prevent this. Is it legal to tell them that we accept only signatures on bills of lading not their own delivery receipt?

Answer: Part of the answer to your question lies in the language of the "Carmack Amendment", 49 U.S.C. Section 14706, which provides:

> (2) FREIGHT FORWARDER- A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service and uses a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

As you can see, this permits the delivering carrier to use your freight forwarder's bill of lading as the delivery receipt, but it does not expressly require this. If you want the delivering carrier to use only your bill of lading, you could include this requirement in a properly drafted transportation contract.

10) BILLS OF LADING – BILLING INSTRUCTIONS

Question: Our current procedure for billing our invoices is to always go by payment terms listed on the bill of lading ("B/L"). Collect - we charge the consignee and Prepaid - we bill charges to the shipper. Unless Third Party is given as the freight terms we do not look to any other party information for the responsible payor including "Bill to" parties.

As a credit/rebill clerk I am forever rebilling to "Bill to" parties and "In Care Of" parties listed on the B/L. Both are issues that many within the company seem to disagree on. I was told by one of our service center managers that legally if the B/L is collect and has a consignee with and in care of party having 2 parties listed we should be billing the name listed first on the B/L.

example:
John Doe
%Jane Doe
1111 Doe St
Chattanooga, TN

Our procedures state that we bill to the address of delivery. So regardless of how the parties are listed on the B/L we bill our invoices to whoever is at 1111 Doe St. So if this is not John's address then he will not be considered the responsible party and Jane will receive our invoice for our freight charges.

This is a big issue when delivering to a receiving warehouse or an installer who refuses payment as this is not their freight. Usually when we receive the B/L it does not give the other parties address and "Third Party" is not given as freight terms.

If freight terms on the B/Ls is collect, legally, should we be billing as a third party invoice to "Bill to" parties and names given on the first line of a B/L with "In care of" listed as the consignee?

Answer: I'm not sure that there is a simple answer to your question.

Usually when there is a "bill to" instruction on a bill of lading it means that the shipper (or the consignee) has designated a freight payment agent or service to handle payment of its freight charges. Under normal circumstances, the freight bill should be sent to the designated freight payment agent or service.

Each situation has to be evaluated based on the language and/or instructions set forth on the bill of lading.

On "freight collect" shipments, when delivering to a consignee that is not the beneficial owner of the goods (such as a warehouse, installer, other trucker, etc.), I would think that you should try to bill the real owner/consignee or the party that they have designated as the "bill to" party.

There is a specific provision in the Interstate Commerce Act that deals with this situation. 49 U.S.C. § 13706 covers the liability of a party OTHER than the shipper or consignor, namely a consignee that is an agent only (such as a warehouse, installer, other trucker, etc.). The intent of this section is to give the consignee a means of avoiding liability when it is only acting as an agent and has no beneficial interest in the goods. If the consignee gives proper notice to the carrier, then it will have no liability for any "additional rates", and the shipper or consignor (or the beneficial owner) may be liable for "additional rates" such as arising when the shipment is diverted or reconsigned.

11) BILLS OF LADING – DECLARED VALUE

Question: Is it necessary to put the declared value on the bill of lading in order to insure the freight for total value?

If you leave the declared value section of the bill of lading blank but the value of the shipment is listed on the commercial invoice, is the shipment fully insured?

Answer: Since you are located in Ontario, I assume that you are shipping from a point in Canada using the standard Canadian motor carrier bill of lading. If so, there is a limitation of liability of $2.00 (Canadian) unless you declare a value and pay an additional charge.

If you have a written transportation agreement, you can, by contract, negotiate different provisions, including carrier liability for loss or damage. We always recommend that our clients enter into transportation agreements with the carriers that they use.

12) BILLS OF LADING – FREIGHT TERMS

Question: I am interested in the correct terminology with respect to Prepaid, Collect, Prepaid Bill 3rd Party, Collect Bill 3rd Party, etc., that should be used on a Bill of Lading. We are a retail logistics organization that contracts with a third party logistics company to pick up merchandise from our vendors for delivery to Flow Through Centers. Since we pay the carriers for the inbound transportation, is it appropriate to state the freight terms on the bill of lading as: Prepaid Bill 3rd Party or Collect Bill 3rd Party?

From a claim perspective of the receiving center, I believe this may have significant implications, but defer to your guidance.

Answer: The terms "prepaid" and "collect" establish the primary responsibility for payment of the freight charges (by the shipper or by the consignee, respectively).

The Uniform Straight Bill of Lading in the National Motor Freight Classification (NMFC) provides for charges to be "prepaid" unless the box is checked "collect". There is no provision on the Uniform Straight Bill of Lading for "bill 3rd party"; these instructions are generally entered somewhere in the description field.

Many shippers use bills of lading that differ in form from the Uniform Straight Bill of Lading, and these forms often provide spaces for billing instructions.

Now, to answer your specific question, if the freight is consigned to your Flow Through Centers, and you will be paying the freight bills, I would say the correct terminology would be "Freight Collect, Bill 3rd Party".

I would also note that the responsibility for payment of freight charges does not determine risk of loss in transit, or which party should file claims for loss or damage. This is determined by the terms of sale ("FOB terms") as between vendor and purchaser.

13) BILLS OF LADING – INTRA-COMPANY MOVEMENTS

Question: We manufacture product in one building (A) and transfer it to different buildings which can include: (B) another building we own about 10 miles from (A), or (C) a local warehouse company 15-19 miles from (A).

This transfer is handled by: 1) our own drivers and company owned equipment and, 2) local trucking company who uses their own drivers and equipment. The routes include town roads, state highways and federal highways depending on the transfer.

Currently, the only documentation we provide is a handwritten packing list that shows item numbers and internal description. Since we are just moving the product between our own or rented facilities do we still need to prepare a Bill of Lading?

Answer: It is not necessary to prepare a "bill of lading" - whether the shipments move in your own trucks or those of a for-hire carrier. However, it is always a good practice to at least obtain a receipt from the carrier for anything that you ship in the event there should be any loss or damage to the shipment. The receipt can be part of your packing list, but it should as a minimum identify the goods, the number of cartons or pieces, etc. and should be signed and dated by the driver.

14) BILLS OF LADING – LANGUAGE LIMITING LIABILITY

Question: I have a Bill Of Lading that has a declared value of property listed, but it also states "Liability Limitation for loss or damage in this shipment may be applicable see 49 U.S.C. § 14706 (c) (1) (A) and (B)." What does this mean?

Answer: The reference to "49 U.S.C. § 14706 (c) (1) (A) and (B)" is from a section that was added to the original "Carmack Amendment" language and is found in Title 49 of the U.S. Code. The text of the section reads:

(c) SPECIAL RULES-

(1) MOTOR CARRIERS-

(A) SHIPPER WAIVER- Subject to the provisions of subparagraph (B), a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 may, subject to the provisions of this chapter (including with respect to a motor carrier, the requirements of section 13710(a)), establish rates for the transportation of property (other than household goods described in section 13102(10)(A)) under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

(B) CARRIER NOTIFICATION- If the motor carrier is not required to file its tariff with the Board, it shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall

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16) BILLS OF LADING – LIABILITY FOR MISINFORMATION

Question: A client of mine requested that I pick up a shipment of goods from a location in Jacksonville, FL and deliver it to Detroit, MI. I, being a broker, hired a common carrier to pick up the freight. When the common carrier went to pick up the freight the common carrier was given the wrong freight. The common carrier was then called by the shipper and told to bring the goods back to the dock. The common carrier did as requested and was given different freight and a new bill of lading. Several days later, the shipment arrived at the consignee's dock. The consignee stated that the freight was not meant to come to the consignee but rather it was supposed to go to a different location.

I immediately called my client and initiated a telephonic conference with my client (a food broker), the carrier and myself. It was determined that the shipper gave the wrong bill of lading to the common carrier driver, and so the common carrier requested and received authorization to reroute the shipment. After the shipment was delivered the freight bill from the common carrier went from $749.00 to $4,150.00. I approached my client and told them of the cost, and my client told me they were only going to pay the original quoted cost. My question is simple, is my client liable for the entire new amount of $4,150.00? Neither myself or the common carrier did anything wrong.

Answer: From your description of the facts, it does appear that the shipper was responsible for the multiple foul-ups. If so, and there was no negligence on your part or on the part of the motor carrier, the carrier is entitled to be paid and the shipper should pay the freight charges.

17) BILLS OF LADING – LIABILITY OF PARTIES

Question: We are a cooperative that manufactures grape juice and jelly. We entered into an agreement with a co-manufacturer to produce and distribute some of our refrigerated juices.

It has come to my attention that we are listed as the shipper on bills of lading for shipments out of their facility, even though the carrier was selected by the co-manufacturer. The co-manufacturer's reasoning for doing this it that they consider our product to be consigned, and therefore not owned by them, so therefore, they should not be the shipper of record.

I've tried to explain to them that the bill of lading is a contract between the shipper and the carrier for a specific shipment. Since the co-manufacturer is selecting the carrier, negotiating the rates, signing the necessary contracts and rate sheets with the carrier, and is responsible for loading the trucks at their facilities, my position is that they should be listed on the bill of lading as the shipper.

Should we be named as shipper on the bill of lading and what is our liability?

Answer: A good question.

You have an "apples & oranges" situation.

1. It would appear that you are the "owner" of the goods and that the co-manufacturer has no beneficial interest in the goods. Thus, you would most likely be the party to file a claim if there was loss or damage in transit. From a "legal" standpoint, the co-manufacturer could be considered as your agent with respect to the shipping arrangements with the motor carrier. Since you are shown as shipper on the bill of lading, you would also have primary liability for the payment of freight charges, unless the goods are shipped freight collect and Section 7 (non-recourse provision) is signed.

2. On the other hand, you apparently have no control over the shipping arrangements, including the negotiation of rates, terms and conditions with the motor carriers. Thus, you could be subject to excessive freight charges, late payment penalties, uncollectible loss & damage claims, or other problems with the carriers.

3. The real problem is with your co-manufacturer. It would seem that the best advice would be to impose some strict controls in your contractual agreement with the co-manufacturer. For example, you might want to require that they assume liability for loss or damage in transit, and that they indemnify you against any claims that may arise out of their arrangements with the carriers.

18) BILLS OF LADING - NOTING COUNT ON BOL

Question: Our company manufactures copper water tube, straight lengths and coils. It is shipped in taped bundles of 10-25 pieces for straight lengths and in cartons/pallets for coils. To streamline our bill of lading printing, our IT Dept. would like us to print out only the total number of pieces on a shipment on the bill of lading. At present, we list bundles containing X number of pieces on the bill of lading.

What is your opinion of listing only the number of pieces on a bill of lading? Are there any liability or claim issues?

Answer: I assume these are domestic truck shipments.

The problem that most commonly comes up is with shortages on palletized shipments. Carriers usually instruct their drivers to sign only for the number of pallets (because it is difficult

or impossible to count the cartons on a shrink-wrapped pallet). Likewise, at delivery, many consignees will only sign for a pallet count.

Your situation is analogous except that you are shipping in "bundles" rather than pallets. In any event, I don't see how there could be any negative effect of listing only the total piece count on your bills of lading, so long as the driver signs for the piece count (not bundles), and the delivery receipt acknowledges the number of pieces delivered to the consignee.

19) BILLS OF LADING – REQUIRED INFORMATION FOR MULTIPLE STOPS

Question: Is the full name and address of the consignee required on a bill of lading?

I have a shipper who wants to create a multi-stop load with three consignees, but does not want the consignees' names on the bill of lading. The shipper does not want each consignee to know what the other is receiving.

Can the shipper leave the names off of the Bill of lading?

Answer: There is an FMCSA (formerly ICC) regulation that defines what a bill of lading must contain, namely 49 CFR PART 373 - RECEIPTS AND BILLS:

Subpart A-Motor Carrier Receipts and Bills

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).

Note that this regulation is applicable to the motor carrier, and not to the shipper, who may often prepare the bill of lading.

The practice you describe could lead to problems if there should be a dispute between the shipper and one of the consignees as to responsibility for freight charges or a claim for loss or damage to the goods.

It would seem to me that a better practice would be to issue a master bill of lading and three separate bills of lading - one for each of the individual consignees.

20) BILLS OF LADING – RETENTION OF SCANNED RECORDS

Question: Is there a reason to keep the bills of lading after we scan them into the computer, or should we also retain the hard copies for a period of time? If so, how long?

Answer: Scanned documents are becoming more accepted throughout the industry, and usually will be accepted into evidence in court provided that they can be authenticated as business records kept in the ordinary course of business.

The problem I see is that bills of lading, which are a receipt for the goods tendered to the carrier, and which may also be used as a delivery receipt, usually have hand-written notations, signatures, stickers, stamps, etc. It is not unusual for questions to arise as to who made the notations and when they were made, especially in disputed claims for loss or damage. The ability to examine the original documents, as opposed to copies, can therefore be important.

Since cargo claims must generally be filed within 9 months of delivery, or within 9 months after a reasonable time for delivery in the event of a non-delivery, I would suggest that original

bills of lading be retained for at least that period of time. If a claim does arise, the bill of lading should be kept until there is a resolution to the claim.

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22) BILLS OF LADING – SHOWING OWNER OF GOODS

Question: I need to know what the proper "Ship From" address must be shown on a Bill of Lading if a company uses 3rd party distribution service other than their own company, etc.

Example: Is this the proper way?

ABC Co
C/O 3rd Party Dist. Services
123 American Way
Any Place USA, IN 47274

Or is it o.k. to just show the 3rd party address only, as follows:

3rd Party Dist. Services
123 American Way
Any Place USA, IN47274

What legal ramifications are there if the seller's company name is not shown on the B/L? Does the warehouse or agent's name have to be included in the shipper's address anywhere?

Answer: I would say that it is a better practice to show the beneficial owner as the shipper of the goods (c/o the warehouse or other agent that is being used).

This establishes that the owner is a party to the contract of carriage and is a proper party in the event of a claim for loss or damages. Note, however, it also may have the consequence that the owner becomes liable to pay the freight charges if the agent or the consignee does not pay them.

It probably would be sufficient to show just the address of the physical location from which the goods are shipped, although it may be better to include the full name and address of the warehouse ("c/o ABC warehouse"). You could have situations where goods are refused, undeliverable, or where the carrier wants to send an on hand notice, etc. and needs that information.

23) BILLS OF LADING – SIGNING CLEAR

Question: I am looking for legal documentation that shows that once consignee signs bill of lading free and clear of shortage or damage, that the carrier's obligation has been fulfilled and is no longer liable for either at a later date.

I do not know where to find this.

Answer: You can't find it because it is not true.

Signing a "clear" delivery receipt only creates a rebuttable presumption that a shipment has been delivered in good order and condition. When loss or damage is discovered after delivery, it is usually because the loss or damage was concealed and not readily determinable at the time of delivery. Quite often, no one at the consignee's dock actually inspected the shipment.

In such cases, there is an additional burden on the consignee to show, with competent evidence, that the loss or damage did in fact exist at the time of delivery and did not occur some time after delivery. If this burden can be met, the carrier would still remain liable. See the ICC's Administrative Ruling 120 on Concealed Damage Claims, Appendix 85, page B-93 in *Freight Claims in Plain English* (3rd Ed. 1995), which contains valuable advice to claimants on how to maximize chances of obtaining prompt and satisfactory settlement of loss and damage claims.

24) BILLS OF LADING – SIGNING COPIES

Question: We normally print three copies of the Bill of Lading for every shipment that we have. Is the driver required to sign all three copies while in our presence? Or is he able to only sign copy 1 that we keep for our records but not the other two that he takes with him? I thought that by law all copies of the Bill of Lading must have a signature and be signed in the presence of the consignor?

Answer: There is no "legal" requirement that the driver sign all copies. What IS important is that the driver sign the shipper's copy of the bill of lading. This is the "contract of carriage" and a receipt that acknowledges that the carrier has received the quantity of packages or goods as described on the face of the bill of lading, and that they were in good order and condition when received.

25) BILLS OF LADING - THIRD PARTY NOTATION

Question: I work at a steel fabrication shop (company A) in Washington. We have a customer (company B in NH) who is asking me to alter shipping documents to ship to his customer (company C in NC).

We have fabricated metal pieces that need to be shipped to company C in North Carolina from our facility in Washington. Company B is based out of New Hampshire. Company B is demanding that I use their Packing List on their shipment. They have stated that they do not want our (company A) name or address anywhere on the documents.

My concern lies in the fact that if I send a truck out of our facility stating that the ship from address is New Hampshire and the ship to address is North Carolina, if the driver's paperwork gets checked in Idaho (for example), won't there be a question as to why this truck is on the west coast heading east when his paperwork reflects that he picked up the load on the east coast and should be heading west? Isn't that considered falsifying the Bill of Lading? If so, what repercussions does company A face? Also, all of my Bills of Lading are pre-printed with our (company A) name and address.

Is this legal? There wouldn't be any discrepancies with the weight, or the load content - just the shipping addresses. Can a shipment - such as this - going across the United States be

considered a blind shipment? I just want clarification that Company A will not be at fault for falsifying documents.

Answer: You raise an interesting question.

There is a provision in the Federal Bills of Lading Act, 49 U.S.C. Section 80116, that provides as follows:

> 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.

While this statute might appear to be applicable to the situation that you have discussed, it is a fairly common practice for a seller to ask that the seller's name be shown as the shipper on a bill of lading, so that the purchaser will not know the source of supply for the goods. I am not aware of any court decisions on this subject, or any criminal prosecutions for doing this, commonly referred to as "drop shipping".

As a matter of legal theory, if your customer has taken title to the goods at your shipping dock, you would be considered as the customer's agent in making the shipping arrangements, including preparation of the bill of lading. I would suggest, in any event, that you make sure the customer's instructions are in writing, and you may want to ask for a "hold harmless and indemnification" provision in the event there were any claim in connection with the shipment.

26) BILLS OF LADING – TITLE WHEN FREIGHT BILLED TO THIRD PARTY

Question: My company has shipments that we pay the freight on from a vendor to another vendor's warehouse. We are neither the shipper nor the consignee. We understand that the freight charges are to be billed to us as a third party, but do we list it as prepaid or collect? My other question involves title to the freight, how do we note who is to be designated as owner of the freight when the shipment is from the vendor to another vendor's warehouse? We want to make sure we note everything so that we know who is responsible to file the claims and at what point is it that we would hold the title to the freight? We want the origin vendor to retain title to the goods upon delivery and after the delivery.

Answer: Apparently you are shown as a third party payor on the bill of lading for the shipments from your vendor's manufacturing facility to one of its warehouses.

A "bill to" instruction on the bill of lading does not affect the basic contracts between the shipper and the carrier as far as carrier liability, nor the risk of loss in transit as between the seller and the buyer. Title to the goods would be determined by the terms of sale between the parties and indicate who should file any claims.

BILLS OF LADING - TYPES

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

Answer: There are many versions of bills of lading that are available from stationers and commercial printers.

A "straight bill of lading" is a non-negotiable bill of lading. There is also an "order bill of lading", which is a negotiable bill of lading, i.e., it is essentially a document of title and the person having physical possession of the order bill of lading is entitled to possession of the

goods. Order bills of lading are usually only used in international transportation, and are rarely used in domestic trade. The legal definitions and obligations of the parties under these different types of bills of lading are governed by the "Bills of Lading Act", 49 U.S.C. § 80101, et. seq.

The "Uniform Straight Bill of Lading" ordinarily refers to a straight bill of lading form that is found in the National Motor Freight Classification. Most domestic LTL truck shipments move under a "Uniform Straight Bill of Lading" and there are two versions: a "short form" and a "long form", the difference being that the terms and conditions of contract are printed on the back of the "long form".

27) BILLS OF LADING – USING INCORRECT WEIGHTS

Question: How serious of a legal problem is it if I discover that one of our operating companies is knowingly putting incorrect weights on their bills of lading ("B/L")? This was brought to my attention by one of our carriers.

Answer: I suppose, in theory, such a practice could violate the Bills of Lading Act (specifically 49 U.S.C. § 80116) that provides:

> 49 U.S.C. § 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.

I cannot recall ever seeing this section enforced except in the case of the negotiation or transfer of a false or fraudulent Order (Negotiable) B/L.

Also, I have never heard of a civil action against a shipper for preparing fraudulent bills of lading, although it could be a valid cause of action.

Certainly, it is NOT a good practice and the carrier would have the right to go back and re-rate the shipments based on the correct weights and rates.

Note: the carrier must issue bills for charges in addition to those originally billed within 180 days of the receipt of the original bill, see 49 U.S.C. § 13710.

28) BMC-32 ENDORSEMENT - APPLICATION TO CONTRACT CARRIAGE

Question: For BMC-32 Endorsement, an insurance company is contending that it does not apply on shipments moving under contract carriage but only on common carriage. Pursuant to the ICC Termination Act ("ICCTA") the distinction between common and contract carriage was to be eliminated. Is there still a distinction between common and contract carriage and what does the BMC-32 apply to?

Does the BMC-32 apply on contract carriage even though it is not specifically included in the contract itself?

Answer: Although the statutory distinction between "common" and "contract" carriers was eliminated back in 1996 with ICCTA, the Federal Motor Carrier Safety Administration ("FMCSA") has, to this day, continued to register carriers as common or contract carriers. A recent case involving Fortunoff was appealed to the 2nd Circuit and, unfortunately, that court held that the FMCSA could still only require "common" carriers to maintain mandatory cargo insurance (BMC-32).

Thus, insurance companies are taking the position that the BMC-32 is not applicable to claims where there is a formal contract between the parties.

Hopefully, this will be resolved when the Unified Registration System becomes effective.

29) BMC-32 ENDORSEMENT - INSURER REFUSES TO PAY

Question: Which entity regulates the BMC-32 guidelines, and when an insurance company/adjustor does not understand/refuses to comply what procedures can a Broker take?

I have provided the verbiage of the BMC-32 from our insurance agent. The company, a third party adjustor, tells me they do not understand the BMC-32 or why they should pay for the claim. What should I do?

The verbiage is as follows:

> The BMC 32 is not subject to any deductible, and it is not subject to policy exclusions. The insurer must pay any "loss of damage the insured [carrier] may be held legally liable", regardless of any "condition, provision, stipulation, or limitation" in the underlying cargo policy between the carrier and the insurer.
>
> .....NO CONDITION, PROVISION, STIPULATION, OR LIMITATION CONTAINED IN THE POLICY, OR ANY OTHER ENDORSEMENT THEREEON OR VIOLATION THEREOF, OR OF THIS ENDORSEMENT BY THE INSURED, SHALL AFFECT IN ANY WAY THE RIGHT OF ANY SHIPPER OR CONSIGNEE, OR RELIEVE THE COMPANY FROM LIABILITY FOR THE PAYMENT OF ANY CLAIM ARISING OUT OF SUCH TRANSPORTATION SERVICE FOR WHICH THE INSURED MAY BE HELD LEGALLY LIABLE TO COMPENSATE SHIPPERS OR CONSIGNEES, IRRESPECTIVE OF THE FINANCIAL RESPONSIBILITY OR LACK THEREOF OR INSOLVENCY OR BANKRUTPCY OF THE INSURED.

Answer: When the Interstate Commerce Commission ("ICC") was still in existence, complaints such as yours would have been investigated and appropriate action taken to enforce the regulations. The Federal Motor Carrier Safety Administration ("FMCSA"), which took over the remaining functions of the ICC after 1996, should be the proper agency to enforce these regulations now, such as the regulations governing the BMC-32 at 49 CFR Part 387.

You can try contacting the FMSCA (their website is http://www.fmcsa.dot.gov/), and asking them to intervene, but I would not expect much help. A letter from your corporate attorney to the insurance company might get their attention, and as a last resort you could bring a lawsuit directly against the insurer, see *Freight Claims in Plain English* (3rd ed. 1995) at Section 12.3.8.

30) BMC-32 ENDORSEMENT - INSURER'S DEFENSES

Question: I recently pursued filing a claim against a carriers BMC32 endorsement because they failed to acknowledge or respond to a claims issue.

The insurance company responded with the following regarding the BMC 32 endorsement:

> You should be aware that the liability of the insurer under the BMC 32 is predicated upon the established liability of the motor carrier. Therefore, a claim cannot be honored under the BMC32 endorsement until the liability of the motor carrier has been legally established. All bill of lading and common law defenses available to the motor carrier are also applicable to any claim made under the BMC 32 filing.
>
> A prerequisite for establishing liability on the part of the motor carrier, in accordance with the terms and conditions of the Bill of lading and title 49 CFR 370. Therefore, in order for [Our] Insurance Company to give your claim consideration under the

BMC32 you must provide us with evidence that a proper claim has been filed with the motor carrier, and that the motor carrier has not responded to the claim.

So here are my questions related to above.

1) Are Bill of Lading ("B/L") common law defenses applicable to the BMC-32 endorsement?

2) I assume the insurance company should have investigated by following through with their insured to verify if a claim was filed?

3) Should I report this to the Federal Motor Carrier Safety Administration ("FMCSA")?

Answer: Let me answer your three questions:

1) Are Bill of Lading ("B/L") common law defenses applicable to the BMC-32 endorsement?

Yes, the insurer may assert valid defenses such as act of God, act or default of the shipper, etc.

2) I assume the insurance company should have investigated by following through with their insured to verify if a claim was filed?

Usually the insurer will request a copy of the carrier's claim file, but sometimes the carrier is out of business or bankrupt, in which case they have the right to ask the claimant for the claim information.

3) Should I report this to the FMCSA?

No. Don't bother -- they really don't care about enforcing the regulations.

31) BROKERS – BACK SOLICITATION

Question: I am a freight broker located in north Jersey. I am having a problem with one of my shippers. I have been moving their freight for about the last two years. The problem is they are going to my carriers and asking them to sign on with them and are cutting me out of the picture. The shipper knows that all of my carriers have a contract with me and that there is a no "back solicitation" clause in it. The shipper is telling the carriers that because they are not using me anymore that they would not be breaking the law by signing on with them. Can they do this? What is my recourse?

My second issue is that the same shipper is withholding payment to me on loads owed for a total of well over $50,000.00. They are not paying me because of a load that was high jacked (state and local police, and the FBI were notified). This is creating serious difficulties because I owe this money to other carriers. I have a one-man operation and can't afford this hit. What can I do?

Answer: First question: You indicate that you have a "no back solicitation" clause in your contracts with the carriers. Without knowing the language of this clause, I would assume that this would be enforceable against the CARRIERS, but it would not be enforceable against a SHIPPER that is not a party to that contract. Depending on the language used, it might give you a remedy to collect your usual commission or profit from the carriers.

As for any remedy against the shipper, there is a legal cause of action generally known as "tortious interference with an advantageous business relationship". It would seem from your description of the facts that this might be applicable.

Second question: It is not uncommon for shippers to offset freight charges owed to a broker (or to a carrier) when there are unpaid freight claims.

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. This may happen because the company holds dual authority as a carrier and a broker, commingles functions, uses common dispatchers, etc. 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. Third party logistics providers often claim to be "all things to all people", without distinguishing the different legal roles involved.

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.

If you don't fall into one of these three categories, you should immediately advise the customer that the claim should be filed and pursued against the responsible motor carrier, and not against your company as the broker. Explain to them that, as a broker, you do not assume any liability for loss or damage in transit. You may wish to assist them in filing a claim against the carrier, but you should not accept liability for the alleged loss or damage.

If the shipper does not pay your freight charges the only remedy is to bring a lawsuit. Note that, if you do, it is likely that the shipper will assert a counterclaim for its loss & damage claims, which will undoubtedly complicate matters.

In any event, I think you are going to need a good transportation attorney.

Lastly, I note that some of the problems you have described could be prevented by properly drafted contracts with your carriers and your shipper-customers.

32) BROKERS – DOUBLE BROKERING LOADS

Question: We are a freight brokerage company and have been approached by other brokerages to broker their loads and have also been called by brokerages about our loads. We believe that it is illegal to double broker, is this true? What are the guidelines for broker to broker business?

Answer: It is not "illegal" to double-broker a load. However, it is a practice that can lead to serious problems including litigation in the event of cargo loss or damage, or accidents involving personal injury or property damage. It may also be a violation of the contract between the first broker and his shipper customer.

33) BROKERS - INSURANCE

Question: Can you tell me what this insurance is from the new broker contracts? I am unfamiliar with Errors and Omissions Liability and I am getting some resistance from the brokers on this one.

> b. BROKER shall acquire and maintain, during the term of this Agreement, Errors and Omissions Liability Insurance as may be appropriate and available in the amount of not less than $200,000 per claim, covering claims, losses, damages or injury to SHIPPER or SHIPPER's property arising out of any act, error or omission of the BROKER in the rendering of broker or related services.

Answer: Many brokers have what is called "contingent cargo liability" insurance that is supposed to be a backup for the cargo insurance of the actual motor carriers that they use. If the motor carrier's policy doesn't cover the loss or is inadequate, these policies are supposed to protect the shipper. Unfortunately, this protection can be illusory at best, because most of the policies have very many exclusions and conditions.

Furthermore, contingent cargo policies really don't address the broker's legal liability.

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When we prepare a "shipper-broker" contract we try to require insurance that will cover the situation where there is some negligence on the part of the broker that causes or contributes to the loss, i.e., "errors and omissions" coverage, or where the broker contractually assumes liability.

One policy that we have reviewed is from Avalon Risk Management. The insuring language from the Avalon Broker Policy Form covers a broad range of intermediary services:

3.1.2. Financial Loss – "Errors & Omissions"

a. We will indemnify you amounts you and other protected persons are required by law to pay in damages to compensate others for loss resulting from your negligent act, error or omission committed in conducting your business as a Third Party Logistics Specialist including but not limited to:

i. Arranging the clearance of goods or assisting the customer in connection therewith, including, but not limited to, tariff classifications, valuations, duty and user fee assessments and release of cargo, operating under Customs power of attorney;
ii. Handling and marking of goods (including packing and crating);
iii. Arranging cargo insurance and United States Customs bonds for the account of the customer;
iv. Assisting the customer with the necessary documents for export and import;
v. Arranging the collection of "cash on delivery" charges and assisting the customer in arranging the payment of consignments of goods;
vi. Giving advice to the customer in matters of transport and distribution;
vii. Arranging the storage of goods;
viii. Proper Selection of Carrier - This insurance provides coverage for your negligence in selecting a carrier or subcontractor on behalf of your customer. In the event that a vessel and its cargo be lawfully detained or arrested due to insolvency of the carrier, this insurance also covers the costs associated with recovering cargo from the custody of those who have lawfully detained it; and
ix. Any other contractual obligation approved by the insurer.

You can get further information on this kind of broker insurance from Michael S. Brown, Avalon Risk Management, Inc., 84 Wharf Street, Salem, MA 01970 -- Phone: (978)740-5677; FAX: (978)740-6627; Email: mbrown@avalonrisk.com; Website: www.avalonrisk.com

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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.

When we prepare a "shipper-broker" contract we try to require insurance that will cover the situation where there is some negligence on the part of the broker that causes or contributes to the loss, i.e., "errors and omissions" coverage, or where the broker contractually assumes liability.

One policy that we have reviewed is from Avalon Risk Management. The insuring language from the Avalon Broker Policy Form covers a broad range of intermediary services:

> 3.1.2. Financial Loss – "Errors & Omissions"
>
> a. We will indemnify you amounts you and other protected persons are required by law to pay in damages to compensate others for loss resulting from your negligent act, error or omission committed in conducting your business as a Third Party Logistics Specialist including but not limited to:

i. Arranging the clearance of goods or assisting the customer in connection therewith, including, but not limited to, tariff classifications, valuations, duty and user fee assessments and release of cargo, operating under Customs power of attorney;
ii. Handling and marking of goods (including packing and crating);
iii. Arranging cargo insurance and United States Customs bonds for the account of the customer;
iv. Assisting the customer with the necessary documents for export and import;
v. Arranging the collection of "cash on delivery" charges and assisting the customer in arranging the payment of consignments of goods;
vi. Giving advice to the customer in matters of transport and distribution;
vii. Arranging the storage of goods;
viii. Proper Selection of Carrier - This insurance provides coverage for your negligence in selecting a carrier or subcontractor on behalf of your customer. In the event that a vessel and its cargo be lawfully detained or arrested due to insolvency of the carrier, this insurance also covers the costs associated with recovering cargo from the custody of those who have lawfully detained it; and
ix. Any other contractual obligation approved by the insurer.

You can get further information on this kind of broker insurance from Michael S. Brown, Avalon Risk Management, Inc., 84 Wharf Street, Salem, MA 01970 -- Phone: (978)740-5677; FAX: (978)740-6627; Email: mbrown@avalonrisk.com; Website: www.avalonrisk.com

35) BROKERS - LEGAL REQUIREMENTS

Question: I recently started a brokerage company. Are transportation brokers required to carry $1,000,000 insurance coverage? I am having the dickens of a time trying to explain this to insurance companies, as I do not physically handle the freight. I require the carrier I contract with to have this coverage and check them out for proof of insurance.

At this point I am perplexed, can you give me some advice?

Answer: The only legal requirement (a federal regulation, see 49 CFR Part 387) is that a broker must have a $10,000 surety bond. This is intended to protect carriers and shippers if the broker fails to pay the carrier for its freight charges.

Motor carriers and freight forwarders are required by federal law to maintain public liability insurance and minimum cargo liability insurance.

Brokers are not motor carriers and thus are not eligible to carry motor carrier cargo legal liability insurance. Some brokers maintain "contingent cargo insurance" which is supposed to pay certain claims if the shipper is unable to collect from the actual motor carrier that is responsible for the loss or damage.

Most of these policies are of questionable value.

As a broker, you should not be liable for loss or damage to property while in the custody and control of a motor carrier. It is a good practice to make sure that your shipper customers are aware of this, and agree to it in your contracts and/or rate quotations.

36) BROKERS - LIABILITY FOR FREIGHT CLAIMS

Question: We are a 3rd party logistics company. Our customer submitted paperwork to us for a pick up. We turned this paperwork over to the carrier who picked it up and subsequently

lost it. It came down to the fact that the paperwork contained bad information, which caused a lot of confusion, and the product ended up being lost.

We have taken the following steps:

1. Our customer is trying to file a claim with us. We are denying the claim and telling them they need to go directly to the carrier. I cannot find a section that supports this action.

2. Our customer is withholding the payment of our invoice. We are stressing that they must pay the invoice because the freight moved per their paperwork and they can recoup the freight costs in their claim to the carrier.

Can you please provide further guidance?

Answer: Although you describe your company as a "3PL", it appears that you were acting as a transportation broker in this matter.

1. The liability of a broker has been discussed in this "Q&A" forum before, so I am repeating the following answer that was taken from a recent paper that I presented:

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. This may happen because the company holds dual authority as a carrier and a broker, commingles functions, uses common dispatchers, etc. 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. Third party logistics providers often claim to be "all things to all people", without distinguishing the different legal roles involved.

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.

A review of the recent court decisions illustrates situations in which broker liability for loss or damage has been discussed.

Phoenix Assur. Co. v. K-Mart Corp., 977 F.Supp. 319, 325-26 (D.N.J. 1997) involved a large cast of characters. The shipper, Gerson, had an arrangement with AFC Express to handle it outbound shipments. In October 1993, Gerson had a shipment of watches going from Shawnee Mission, KS to K-Mart in North Bergen, NJ. AFC issued a receipt for the shipment and subcontracted with Red Arrow Air Cargo Express to pick it up; Red Arrow split the goods into two shipments, giving 26 skids to J.S. Trucking (which arrived safely) and 17 skids to Mo-Ark Truck Services. Mo-Ark arranged with U.S. Fast Track, Inc. to transport the 17 skids and Fast Track engaged an owner-operator, James Sherling, who apparently absconded with the watches. Among the issues were whether Mo-Ark was a broker, and if so, whether it could be liable for the loss. The court stated: "In contrast to a 'carrier' or 'freight forwarder', a 'broker', if not negligent, is generally not liable for the value of goods lost in interstate commerce....", citing dicta in *Travelers Indemnity Co. v. Alliance Shippers, Inc.*, 654 F.Supp. 840, 842 (N.D.Cal. 1986). The court observed that Mo-Ark's registration as a broker and Mo-Ark's failure to register as a "carrier" were not dispositive of Mo-Ark's true identity, and that there was a factual issue as to its relationships to Fast Track and Red Arrow. It should be noted that the Court referred the issue to the Secretary of Transportation for a ruling, but the DOT declined to decide the issue, and the case was ultimately settled.

Custom Cartage, Inc. v. Motorola, Inc., No. 98C5182, 1999 WL 89563 (N.D. Ill. Feb 16, 1999, and 1999 WL 965686 (N.D. Ill. Oct. 15, 1999) involved a shipment of cellular phones from Harvard, IL to Miami, FL. Motorola made arrangements with Custom Cartage to handle the shipment, and Custom contracted with J&P Transportation to actually transport the goods. Upon arrival, 22 of the 50 pallets were missing, which amounted to a loss valued at almost $1 million. A pivotal issue in the case was whether Custom acted as a broker. In denying both sides' motions for summary judgment, Judge Kakoras observed: "Much of this case depends on Custom's status in this transaction. If Custom is found to have been a carrier or freight forwarder, it would be liable for the loss under the Carmack Amendnt, 49 U.S.C. § 14706. If Custom was merely a broker and not a carrier or freight forwarder, then Custom would not be liable under the Carmack Amendment. However, Custom may still be liable under a common law breach of contract theory...."

Commercial Union Ins. Co. v. Forward Air, Inc., 50 F.Supp.2d 255 (S.D.N.Y. 1999) involved a $380,000 shipment of computer hard drives from Miami, FL to Boston, MA that disappeared in transit. According to the opinion, Forward "took custody of the shipment in Miami, and issued Airfreight waybill No. 2113785". However, Forward did not actually transport the shipment and arranged for it to be transported by truck. Forward argued that it was not liable under the Carmack Amendment because it had acted as a broker, and also asserted a liability limitation of $0.50 per pound in its waybill. Without really deciding the basis of liability, the court concluded:

> In sum, the Court finds that plaintiff's common law claims may be asserted against defendant despite the fact that the Carmack Amendment does not provide for broker liability for goods lost or damaged during transport by a carrier. These claims, however, are governed by state or federal common law, both of which permit the limitation of liability provision in the Waybill to be enforced. Plaintiff's relief is therefore limited in the manner stated in the Waybill.

In the case of *Hydro Aluminum Louisville v. Quality Services, Michigan*, ___ F.Supp. ___ (W.D.Mich. 2000), Hydro entered into an oral contract with Hub City Ohio to transport a shipment of aluminum billets from Seattle, WA to Holland, MI. Hub City in turn arranged to move the metal from Seattle to Chicago by train and contracted with Quality Services to truck the shipment from Chicago to Holland, but they never arrived. Hydro sued Hub City for common law breach of contract, and sued Quality Services as a carrier under the Carmack Amendment. Hub City moved for summary judgment on the grounds that it was a broker, and also asserted a liability disclaimer printed on the back of its freight invoice. Apparently the plaintiff conceded that Hub City had acted as a broker, and the court focused on the disclaimer, stating:

> There is evidence that the liability disclaimer is consistent with both established law and industry trade practice. In the absence of any evidence that the parties intended otherwise, the Court must find that the intent of the parties was to include the loss liability disclaimer in their agreement. Therefore, the loss liability disclaimer is an implied term in the oral contract. The only obligation Hub City had under the contract was to use reasonable care and diligence in arranging for transportation of the aluminum billets. Since Hydro makes no assertion that Hub City did not use reasonable care and diligence in its selection and hiring of Quality Services, Hub City fully performed under the terms of its oral contract with Hydro and cannot be held liable for breaching that contract.
>
> It is sound policy that transportation brokers are not insurers for the underlying carrier. Brokers have no control over the actual transportation of the goods and should not be held liable if the loads are waylaid through no fault of their own. Other federal courts have held that in the absence of negligence on the part of the broker,

> a common law claim for lost or damaged goods properly lies against the carrier, not the broker. (citations omitted)

Professional Communications, Inc. v. Contract Freighters, 2001 WL 1251640, 2002 U.S. Dist. LEXIS 16915 (D. Md. 2001) involved 5,134 cell phones worth $177,210 that disappeared somewhere between Miami, FL and Baltimore, MD. Professional Communications retained Eagle USA Airfreight to handle the shipment; Eagle had an agreement with Covenant Transport to handle its trucking. Covenant's "separate logistics company", Covenant Transport Logistics, brokered the actual transportation to Contract Freighters. The shipment moved from Miami to a warehouse operated by HBI Priority Freight in Glen Burnie, where they were stored for four days, and then delivered by HBI to the consignee. Although the plaintiffs conceded that Covenant was a broker, they argued (1) that Covenant was liable for the damages caused by it agent, Contract Freighters, and (2) that Covenant was negligent "in failing to assure that the carrier provided to carry the cargo maintained a seal log and employed honest drivers." As to the first argument, the court stated:

> In this case, the plaintiffs have not produced any evidence that the relationship between Covenant and Contract Freighters was anything more than a business contract to ship goods. A mere contract to ship goods does not establish an agency relationship. The fact that the "Driver Trip Sheet" included a heading with attention to "Mike/Covenant" and contained instructions for the driver to report any delays to Covenant Transport is consistent with Covenant's role as broker and does not establish a principal-agent relationship.

As to the second argument that Covenant was negligent, the court stated:

> . . . Even assuming that Covenant owed the plaintiffs a duty, the plaintiffs have not produced any evidence that Covenant breached this duty. For example, the plaintiffs have not shown that Covenant failed to investigate Contract Freighter's shipping procedures or prior shipping history. Further, even assuming there was breach of a duty, the plaintiffs have not produced any evidence that Covenant's hiring of Contract Freighters caused the loss in cell phones.

2. Liability for freight charges is determined by the contract of carriage (bill of lading) and the relevant court decisions, and is independent of any liability for loss or damage to cargo.

As a general rule, a shipper has primary liability for freight charges on a "prepaid" bill of lading; it can also be liable on a "collect" shipment, unless "Section 7" on a Uniform Straight Bill of Lading has been executed. A consignee would normally be liable on a "collect" shipment, but it could also be liable on a "prepaid" shipment, if the shipper fails to pay, on the theory that it has received the benefit of the carrier's services.

In a brokered situation, the shipper's contract is with the broker, not the carrier. Thus the broker has a right to collect its freight charges from its customer regardless of whether there may be a loss or damage claim. If the shipper has paid freight charges, it may usually recoup them as part of its loss or damage claim against the responsible carrier.

37) BROKERS – RATE CONFIRMATIONS

Question: Is a rate confirmation between a carrier and a broker considered contractually binding? What if the carrier has a tariff stating that any paperwork not signed by the President or Vice-President is basically null and void? Does the rate confirmation terms supersede the tariffs?

Answer: You have not indicated the nature of the dispute with the carrier, nor have you provided a copy of the "rate confirmation" that was used, so I can only give you a general answer.

Motor carriers are permitted to enter into contracts "to provide specified services under specified rates and conditions", 49 U.S.C. Section 14101(b). I would think a "rate confirmation" would be considered a contract - at least as to the terms and conditions that are set forth in the document.

The question of whether a carrier would be bound would probably depend on whether the person signing on behalf of the carrier has actual or apparent authority to act on behalf of the carrier - a question that depends on the specific facts, e.g., if there is some prior course of dealing with the carrier that involves faxing or emailing rate confirmations.

38) BROKERS – SHIPPER AS LOSS PAYEE ON CARRIER POLICY

Question: On our current broker contract we have the following:

All carriers shall carry public liability, property damage and cargo liability insurance in such minimum amounts as may be required by law, provided however that such carriers shall maintain "all risk" cargo insurance covering SHIPPER's cargo in the minimum amount of $100,000.00 per vehicle. BROKER shall obtain and make available to SHIPPER, upon request, copies of the carriers' insurance policies showing type and amount of coverage, and any deductibles or exclusions. Said cargo policies shall name SHIPPER as "Loss Payee."

Many brokers have begun marking through the last line, is this a deal breaker? We are not sure how critical this is.

Answer: Asking the broker to require its carriers to name your company as a "loss payee" on their cargo insurance policies is a "nice to have" provision and we have sometimes put that kind of language in our shipper-oriented contracts. In our experience, this rarely if ever happens. It is difficult enough to get copies of carriers' actual cargo insurance policies, and many carriers balk at providing these. There is also the obvious administrative problem of monitoring and trying to enforce such a requirement, especially when the shipper has no direct control over the carriers that are selected by the broker.

You can leave this language in your standard agreement, but be prepared to back down if challenged by the broker.

39) BROKERS – SURETY BOND

Question: When a Broker goes out of business and we are still owed money, how do we go after their Surety Bond for payment of the monies that are owed?

Answer: Brokers are required to file a surety bond (BMC 84) and this information is available on the Federal Motor Carrier Safety Administration ("FMCSA") website. Most broker surety bond companies will respond to a written claim from the carrier and will not require that the carrier first obtain a judgment against the broker, but we have heard of one that did require the carrier to have a judgment. The FMCSA website is http://www.fmcsa.dot.gov and the registered agent and surety bond information can be found by accessing the "licensing and insurance" section.

40) BROKERS – SURETY BONDS

Question: Federal regulations require brokers to carry a surety or a trust fund bond but do not stipulate what the procedures are for filing a claim. There is mention that part of the regulation for Miller's Act apply for broker claims. And Miller's Act stipulates notice must be filed before filing a claim. My question is: Does notice need to filed to a broker before filing a claim

against their bond and if so per Miller's Act the notice has to follow a tier process. What tier does the broker fall under?

Answer: Federal Motor Carrier Safety Administration ("FMCSA") regulations provide that brokers must maintain a surety bond or trust fund in the amount of $10,000, and file evidence (form BMC-84 or BMC-85) with the FMCSA, see 49 CFR 387.307.

The FMCSA website is www.fmcsa.dot.gov and the registered agent and surety bond information can be found by accessing the "licensing and insurance" section.

I am not aware of any requirement that a "notice" be filed with the broker, but it would be common sense that the carrier should demand payment from the broker before filing a claim against the surety company.

Most broker surety bond companies will respond to a written claim from the carrier and will not require that the carrier first obtain a judgment against the broker, but we have heard of one that did require the carrier to have a judgment.

41) BUMPING PRIVILEGE

Question: Please clarify the term "Bumping Privilege", I was told it was in the "NMFC Rules," what exactly does it mean /cover?

Answer: It is in Item 171 of the Classification, and is used to provide shippers with a means to obtain lower freight charges in certain situations, which states in part:

> ITEM 171 APPLICATION OF CLASSES—ARTIFICIAL CONSTRUCTION OF DENSITY TO OBTAIN A LOWER CLASS (BUMPING)
>
> Where commodities are subject to Classification provisions which assign classes based upon density, a shipper may, at its option, increase the weight of the package(s) to artificially increase the density of the package(s) or piece(s) to artificially increase the density of the package(s) or piece(s) and apply the next lower class in the density scale to that increased weight, where the result would be a lower charge. THIS MAY ONLY BE DONE WHERE THE APPLICABLE PROVISIONS MAKE SPECIFIC REFERENCE TO THIS RULE AND MAY ONLY BE DONE AT THE TIME OF SHIPMENT.

Bumping is accomplished by determining the actual cubage of the particular package(s) or piece(s) and multiplying that cubage by the lowest density named in the density group which provides the next lower class.

42) CARGO CLAIMS – APPLICATION OF COGSA TO INLAND LEG

Question: I understand there was a court finding in July, 2006 regarding the COGSA (Carriage of Goods by Sea Act) limit of $500 per package being found not in effect. I have a waybill from Kobe, Japan to the door of the consignee with no value on the waybill and no other documents regarding this cargo except this waybill. The loss occurred months ago so I am holding "fast" to the $500 limit per package but for future claims, would the court decision in July 2006 change the $500 per package limit on ocean cargo?

Answer: I am assuming that your question involves the liability of a domestic inland carrier (truck or rail) for loss or damage that occurs in the United States, and that the shipment moved under a multimodal ocean bill of lading from a foreign country to an inland point in the United States.

The usual issue in these cases is whether the liability of the inland carrier is governed by the Carriage of Goods by Sea Act ("COGSA") which is incorporated by reference in the bill or lading or waybill through a "Himalaya clause", or whether the liability is governed by the Carmack Amendment, 49 U.S.C. § 14706 (truck) or 49 U.S.C. § 11706 (rail).

There is considerable confusion, and the courts are divided on this issue.

Some courts look only to the specific language of the multimodal bill of lading to see whether the Himalaya clause is expressly written to include the inland carrier and, if so, will apply the COGSA defenses and limitations (e.g., $500 per package, time limits for suits).

Other courts look to see whether a separate domestic bill of lading has been issued by the inland carrier. If there was, the inland leg will be governed by Carmack; if not, the Himalaya clause will be enforced and the carrier will be entitled to the COGSA defenses and limitations.

One of the most recent decisions in this murky area of the law is the 2nd Circuit Court of Appeals decision in *Sompo Japan Insurance Company of America, v. Union Pacific Railroad Co.*, 2006 U.S. App. LEXIS 17385 (2nd Cir., July 10, 2006). The court reviewed the "statutory landscape" of COGSA, the Carmack Amendment and the Staggers Rail Act of 1980 and concluded that Carmack applies on the domestic inland portion of an import shipment moving on a through multimodal bill of lading, regardless of whether the inland carrier issues a separate domestic bill of lading.

This is a significant decision, and I personally agree with the Court's analysis and conclusion.

Thus, if the loss or damage occurred on the inland leg of a multimodal movement, the answer would probably depend on the jurisdiction in which the lawsuit is brought. If Carmack applies, and the inland carrier did not issue its own bill of lading or did not incorporate a liability limitation in its bill of lading, it would liable for full actual loss.

43) CARGO INSURANCE REQUIREMENTS

Question: What are the government regulations regarding damages to property and where can I find them? I was on your website looking for Government Insurance Regulations on Freight Forwarding Companies not making payments on claims due to damages on their part. If you could direct me to the correct place where I could find the government regulations needed I would be ever so appreciative. Thanks in advance for all your help and have a great day!

Answer: Motor carriers and freight forwarders that are registered with the Federal Motor Carrier Safety Administration (FMCSA) are required to have minimum cargo insurance. The minimum 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.

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.

You can find out the name and address of the insurer that issued the BMC-32 on the FMCSA website: http://www.fmcsa.dot.gov/. From the menus presented you must select "Registration & Licensing", then "Licensing & Insurance", then "Carrier Search" -- and enter the relevant name or MC number of the carrier or forwarder.

44) CARMACK AMENDMENT - STATUTORY HISTORY

Question: Can you tell me where to find a copy of the Amendment to the Hepburn Act online that I can print? I am new at Claims processing.

Answer: I assume that you are referring to the Carmack Amendment (to the Hepburn Act of June 29, 1906). The Carmack Amendment was originally enacted to codify and extend the common law principles governing loss or damage to goods in interstate commerce, and first appeared in 1906 as Section 20(11) of the former Interstate Commerce Act ("ICA").

Over the years there have been a number of changes and additions to the original language. The most important of these were: First Cummins Amendment (1915); Second Cummins Amendment (1916); Newton Amendment (1927); and the Motor Carrier Act of 1935.

The Carmack Amendment was recodified as Section 11707 of the ICA as a result of the 1978 Recodification of the ICA.

Most recently, the language of the Carmack Amendment was again recodified as a result of the ICC Termination Act of 1995 (effective Jan. 1, 1996).

The Carmack Amendment may be found today at 49 U.S.C. Section 11706 (rail carriers) and Section 14706 (motor carriers and freight forwarders). The U.S. Code is available online at http://www.gpoaccess.gov/U.S.C.ode/index.html.

All of this may seem an unduly scholarly answer to your question, but this is the kind of information you can find in *Freight Claims in Plain English* (3rd Ed. 1995), which is highly recommended and available from the Transportation & Logistics Council at http://www.tlcouncil.org..

45) CARRIER OPERATIONS – ISSUES OF COMPLIANCE

Question: What is the legal responsibility of a dispatcher for a commercial motor carrier in terms of compliance with Department of Transportation regulations? Ultimately, whose responsibility is it to make sure that a driver does not run illegally and how much liability is asserted to the carrier, safety department, dispatcher, customer service specialist, and of course the driver? Is the driver's word that he/she is legal sufficient when accepting and dispatching a driver on a run; or as I believe, should it be everyone's responsibility to ensure that your driver is legal?

Answer: The Federal Motor Carrier Safety Administration safety regulations, which are published in 49 CFR Part 350 et. seq. place specific responsibilities on the "carrier" and on drivers of commercial motor vehicles. Dispatchers are required to be familiar with these regulations and to observe the requirements. Otherwise, I don't think there is anything in the regulations that specifies any particular requirements for a "dispatcher".

Obviously, a dispatcher does have responsibilities, and should take them seriously, but the responsibility for observing hours of service rules, keeping logs, etc. is principally on the driver.

You should obtain a copy of the safety regulations and read them carefully, if you have not already done so.

46) CARRIER SELECTION – VENDOR INSTRUCTIONS

Question: I have established an account with UPS and have instructed our vendors to ship via UPS ground and bill our account #. Some of them have responded that they cannot do it for one reason or another (their own freight accounts, cannot bill "third party", etc. Can they do this?

I am looking for text addressing that issue so I can supply it to them to enforce our request. I was told that if our purchase orders state to ship a particular way and that the vendor would be backcharged the difference between what they billed me and what we would have paid UPS, that I am within the law to do so. Is there a certain Tariff # that spells this out, or something else I can use and refer to?

We are not a large company, but would like to take full legal advantage of our UPS account.

Answer: The disputes you are having with your vendors are basically a matter of contract law, and have nothing to do with the carrier or any "tariffs".

You can include provisions in your purchase orders to specify routing, etc. and penalties for failure to observe specified procedures. Of course, there is a risk of upsetting your vendors if you decide to enforce such terms and condition.

47) CARRIER'S LIEN - HOLDING FREIGHT FOR PAYMENT

Question: What are the laws if a shipper issues a bad check, after its parent company (out of the Unites States) goes into receivership? The funds were available when the check was written for previous shipments in the amount of $7,000 on December 7th. However, the bank closed the account prior to the check clearing.

We were contacted by the bank (liquidator) to transport a few loads to a customer and the bank prepaid the shipments, before the last shipment was delivered, we got notification that the check for $7,000 did not clear. What are my rights? I'm holding the freight in a public warehouse until this is resolved. Also, the bill of lading states the owner of record is the shipper and not the bank. The bank says it's not their freight and the shipper states it belongs to the bank. The bank wants me to redeliver the freight back 650 miles. Additionally, the receiver denied the last shipment due to it being one day late.

Answer: I assume that you are an authorized motor carrier and were in the process of delivering the shipment when this problem arose.

A motor carrier has what is known as a "carrier's lien" for the freight charges on a shipment in its possession. This means that you do not have to deliver the shipment unless someone, usually the shipper or the consignee, tenders payment of the freight charges.

You should promptly notify all of the interested parties, in writing, that you are holding the shipment for payment of the freight charges, pursuant to a carrier's lien. Your On-Hand Notice should state the amount of charges (and any storage or other applicable charges) that are due.

If the freight charges are not paid, under the terms of the bill of lading and/or the Uniform Commercial Code, you may have a right to sell the goods in order to recover your freight charges. I would, however, advise you to contact an attorney before doing this.

48) CARRIER'S LIEN - PAST DUE INVOICE

Question: Is it legal to withhold freight until I get paid for a past due invoice?

Answer: I assume you are a motor carrier. A motor carrier has a "carrier's lien" on a shipment in its possession for the freight charges due on THAT SHIPMENT ONLY, but not for any past freight charges on other shipments. If the shipper tenders payment of the freight charges on the shipment you are holding, you must deliver or release the shipment. If you do not, you may be liable for conversion and all damages that result.

49) CARRIERS – AUTHORITY

Question: I am a carrier hauling freight for various brokers and shippers. Do I need a common carrier authority or a contract authority or both?

Answer: First, I would point out that the ICC Termination Act of 1995 eliminated the statutory distinction between "common" and "contract" carriers. Essentially all for-hire carriers are now common carriers with the right to enter into contracts, see 49 USC 14101.

I would note that, even though the law was changed, the FMCSA hasn't yet gotten around to correcting its regulations and is still letting carriers register as "common" or "contract" carriers.

I would suggest that you register only as a “common carrier”. That way, you clearly have the best of all worlds, and you can enter into transportation agreements with your shipper and broker customers.

50) CARRIERS – CONCERNS OVER THREAT OF BANKRUPTCY

Question: We use the services of a large motor carrier that appears to be in financial difficulty and there are concerns of an impending bankruptcy. If it files Chapter 11 reorganization, will there be a disruption of service to our customers?

If it files Chapter 7 and ceases operations, we have a risk of having inventories tied up in transit, resulting in delays to our customers or potentially losing the product altogether. Can a bankruptcy court take possession of any product the carrier may be holding at the time of a shutdown/bankruptcy? As information, our freight terms run FOB prepaid, destination.

Aside from diverting our business to other carriers now, what can our company do, proactively, to avoid any adverse affects of a potential bankruptcy or shut down of a carrier?

I appreciate any input you may have on this subject as we do experience great service from this carrier and I don’t want to make a knee jerk decision to pull the freight, disrupting our service standards, if there are steps we can take to protect ourselves should the carrier’s situation worsen. But at the same time, I must insure there are processes in place to protect our company.

Answer: I hesitate to advise you on the technicalities of bankruptcy laws, but we have had considerable experience with motor carriers that have gone bankrupt:

1. Assuming that a carrier files for Chapter 11 (reorganization), there could be a temporary disruption of service, but the company should continue in business and all shipments that are “in the pipeline” should be delivered.

The bankruptcy court would not “take possession” of any product the carrier may be holding at the time of a shutdown/bankruptcy, since the freight is not property of the bankrupt carrier. Even if operations are shut down, arrangements are usually made to hire other carriers to deliver freight on hand. Service quality will most likely be affected if there are staffing cutbacks, layoffs, or terminal closings. You could have a problem on interlined freight if a connecting carrier has not been paid, asserts its carrier's lien, and refuses to deliver without payment of its freight charges.

2. If you have any open and unpaid loss & damage claims or overcharge claims, they will not be paid and you will have to file a proof of claim with the bankruptcy court. You will be considered an unsecured creditor and will probably be paid a few cents on the dollar when and if distributions are made.

3. If you have received any payments from the carrier (for loss & damage claims, overcharge claims, refunds, etc.) within 90 days of the filing of the bankruptcy petition you may find that the debtor in possession or trustee will seek to treat these payments as preferences and seek to recover the funds.

4. You may want to consider lining up other carriers if the situation worsens, and starting now to get bids and negotiate your transportation contracts.

51) CARRIERS – DETERMINING STATUS OF SERVICE PROVIDER

Question: In the process of qualifying transportation providers for my company there have been several issues regarding asset-based carriers that also have authority to be a broker. Do I need to have a contract carrier agreement and a broker agreement signed? When qualifying a broker we require a copy of the surety bond, but lately the carriers have been getting lazy and

simply sending the information from the FMCSA website, is this sufficient? It seems that in the past couple of years it has become very unclear when a load is tendered to a carrier if it is being tendered to a contract carrier, broker or IMC.

Answer: There are a couple of issues involved.

1. A motor carrier cannot legally act as a broker unless it also has broker authority. There are separate registration requirements with the FMCSA for motor carriers, brokers and freight forwarders.

2. If you have a well-drafted transportation agreement with a registered motor carrier, it should contain language to the effect that the carrier remains responsible and liable for your shipments regardless of whether it provides the transportation itself, or whether it subcontracts or brokers the shipments, or uses substituted service by rail. In other words, you should only need one contract.

3. If you are dealing with some other kind of intermediary or logistics service provider, you will probably need a different kind of agreement because many brokers, 3PL's, IMC's, etc. do not assume common carrier liability or have all sorts of exculpatory language in their service guides, standard trading conditions, etc.

4. The FMCSA has been criticized for not properly maintaining its website information (such as the SAFER system and the Licensing & Insurance system) and having obsolete or incorrect information. However, this still is the official public information source for the status of operating authority and the various filings that are required such as public liability insurance, cargo insurance, surety bonds, registered agents, etc. It is still the best (and only "official") way to determine compliance with the applicable federal laws and regulations.

52) CARRIERS – EXEMPT COMMODITIES

Question: We are a wholesale nursery classed as farm. We have farm tags on all trucks and have been doing the Department of Transportation ("DOT") requirements with physicals, driver records, truck records etc. We travel out of state and more than 150 miles. I recently found a reference regarding "commodities that are not exempt . . . . under 49 U.S.C. 13506(a)(6)." I got a copy of 13506 from the local DOT. It looks like I should be exempt under 13506(a)(4)(A), (a)(6)(B) and possibly under (a)(6)(C) (which I don't have a copy of). The local DOT now says that I am exempt under (a)(4)(A) for farms @150 miles. I was already familiar with the 150 mile farm exemptions scattered through the rest of the manual. Section 13506 doesn't talk about 150 miles and I would like to know if it supercedes the rest of 49 U.S.C.?

Answer: Your reference to "exempt" commodities and certain types of movements is misplaced. The exemptions in 49 U.S.C. 13505 relate back to the days of ICC economic regulation of carrier's rates, rules and practices.

Today, they would only affect whether you need to "register" as a for-hire motor carrier with the FMCSA, as well as certain other legal consequences such as applicability of the Carmack Amendment (49 U.S.C. 14706) in the event of loss or damage to goods in transit.

These exemptions do not exempt a for-hire motor carrier from the federal safety regulations if you are operating vehicles with GVW in excess of 10,000 lb. or are carrying any hazardous materials.

53) CARRIERS - FREIGHT HELD HOSTAGE BY TOWING COMPANY

Question: Our company had a rollover in Roanoke, VA last week. The state police called in a wrecker to right the trailer. The wrecker service has impounded the tractor and trailer along with the contents (Liquid Soap in Bulk) and is demanding payment of $39,500.00 before

releasing contents of trailer. We regularly get this same type of work done for under $5,000. So we are contesting the charges.

How can we get cargo released for owner of said cargo? Can they hold it hostage against services they say they are owed?

Answer: This is not the first time that we have had a complaint about a towing company holding equipment and freight hostage for an unreasonable towing charge.

Technically, the towing company has a lien for its charges against the equipment, but not against the freight. Thus, the owner of the freight has the right to have its freight released, and the towing company would be liable for conversion if it fails or refuses to release the freight.

As for the lien against the equipment, you should first check with the municipality or city that has jurisdiction over the highway where the accident occurred to find out if there is any law or ordinance that governs the charges of towing companies. Many municipalities have a schedule of maximum rates/charges for towing services.

Unfortunately, as a practical matter, you may have to pay the towing company and then seek legal remedies afterward. In any event, you should insist on a detailed statement of the towing company charges (how many trucks, workers, man-hours, etc.) and if it should become necessary to pay the demands of the towing company, your payment should be "under protest".

54) CARRIERS – LIABILITY ISSUES

Question: We are in the process of starting a motorcycle transport and emergency pickup business.

What type of waiver or statement should be on our invoice or proposal so that we are not held liable for any personal property that are in the motorcycles when picked up or shipped? Such as illegal drugs, etc.

I'm not sure if this is something that we should be overly concerned about, but I'm concerned about if we were to pick up a broken bike and the owner had illegal drugs, etc. on it and we transported it and were stopped by the police.

Answer: You can include conditions and limitations of liability in your "invoice or proposal", but the proper way to do this is to include them on your bill of lading or in a tariff that is incorporated by reference in the bill of lading. The reason is that the bill of lading is a "contract of carriage" and is recognized by the courts as a legal contractual document.

I would point out that regardless of any agreement between your company and the shipper, the transportation of illegal drugs or contraband might still expose your company to criminal prosecution.

55) CARRIERS – OPERATING AUTHORITY

Question: We are a start-up logistics company and want to know if we should apply for broker's authority or freight forwarder authority. Our first potential project would include some intermodal transport and warehousing operations, both of which we would contract out to capable parties. Are there benefits to one type of authority over another?

Answer: The first thing you must do is to understand the legal differences between a broker, a freight forwarder and a motor carrier. These terms are defined in the "Interstate Commerce Act" at 49 U.S.C. Section 13102:

> Sec. 13102. Definitions
>
> * * * *
>
> (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.

* * * *

(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.

If you are providing the services of a broker, freight forwarder, or a motor carrier, you MUST register with the Federal Motor Carrier Safety Administration (FMCSA), and comply with all of the applicable regulations (in Title 49, Code of Federal Regulations).

There are no "benefits" of one type of authority over another, although the responsibilities and liabilities are significantly different.

I would suggest that you obtain a copy of the Transportation Consumer Protection Council, Inc.'s course text, "*Contracting for Transportation & Logistics Services*", which explains these differences in detail, and which is available from the Council.

56) CARRIERS - USE OF SCAC CODES

Question: We are a carrier and we have been informed by a shipper that our SCAC Code (Standard Carrier Alpha Code) has been issued to another carrier and is being used by that carrier which is causing major confusion. Our SCAC Code is used daily with our EDI and has been the same since it was issued some 20 odd years ago. What do we do about this and is there anything we can do to resolve the matter?

Is it illegal for a distribution company to operate under one SCAC code but create numerous dummy SCAC codes to identify different locations?

Answer: The following information is from the National Motor Freight Traffic Association ("NMFTA") via their website: http://www.nmfta.org/scac2.htm.

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 late 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 Customs Service 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 in the letter "U" are reserved for the identification of freight containers. Codes ending in the letter "X" are reserved for the identification of privately owned railroad cars. Codes ending in 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 used for identification of freight containers not operating exclusively in North America, intermodal chassis and trailers, non-railroad owned rail cars, and railroads....

I would suggest that you write to the National Motor Freight Traffic Association, Inc., 2200 Mill Road, Alexandria, VA 22314 or contact them at (703) 838-1810 to discuss the issue.

57) CARRIER'S LIEN – CARGO HELD HOSTAGE

Question: We are a freight broker that hired a carrier. This carrier had an accident with their truck and a towing company was used to store the trailer while a tractor was found for the cargo. Now the storage facility is asking for horrendous amounts of money from our carrier to release the trailer with our customer's cargo. The carrier has been coming up with the money and the towing/storage place has been changing it each and every time.

What can we do in regards to legal action if a cargo is held hostage by a storage facility?

Answer: The towing company probably has a lien on the trailer for its towing charges. However, the towing company does NOT have a lien on the cargo. If the towing company refuses to release the cargo, it would be considered "conversion", and the company would be liable for all consequential damages.

If they will not release the cargo, you may need to retain a local attorney. Let us know if we can help you find a transportation attorney in the area.

58) CONTRACTS - TIME LIMITS FOR FILING CLAIMS

Question: We are in the process of revising our motor carrier contract language pertaining to cargo claims and have a question about a change to the claims period.

We are almost entirely an inbound account with title passing to us when the shipment is turned over to our carrier (FOB origin), with whom we have contracted.

We have had a couple of instances where the vendor has shipped by one of our authorized carriers and the entire shipment turns up short with no one aware it is missing. Without going into too lengthy a discourse, it can take a while before our company actually determines that the shipment was made, and then that has either vanished or been misdelivered to an unknown 3rd party. Often this determination takes so long that the standard 9 month time limit to file claims has passed.

Do you have any suggestions for verbiage to insert into the contract extending the claim period from 9 to 12 months, but only for specific situations such as the above? Granted, our

vendor should have started pressing the collection matter sooner, but it is still the case that he shipped using our instructions and our carrier lost the shipment.

Answer: As you know, time limits for filing loss & damage claims are contractual. The time limit for filing a claim in the Uniform Straight Bill of Lading is nine months from the date of delivery or, in the case of a non-delivery, within nine months of a reasonable time for delivery. Many contracts incorporate this provision or have a similar time limit for filing claims.

However, this is the MINIMUM period allowed by law (the “Carmack Amendment”, 49 USC 14706), and the parties are free to contract for a longer period.

I see no reason why you cannot specify a twelve month period for filing claims in your shipper-carrier contracts. I would not suggest attempting to qualify it with some language reflecting your inability to identify shortages, but you could use a different time limit for non-delivery or shortage.

You might use this language:

Time Limits; Claims for Loss or Damage. The time limit within which SHIPPER must file a claim against CARRIER shall be within nine (9) months from the date of delivery, except that in the event of non-delivery or partial delivery (shortage) the time limit shall be within twelve (12) months of a reasonable time for delivery.

59) CONTRACTS – LIABILITY ISSUES

Question: I am in the process of negotiating the contract with the carrier and want to make sure I'm including all pertinent information on the assessment of the equipment prior to shipment. We move used, custom made production equipment from one location to another and want to make sure we have adequate liability limitations. While this equipment is “used”, how can we prove to the carrier that it was in good and operational condition prior to each move? What are the factual questions that need to be answered when preparing for a claim?

Answer: Without knowing all the details of the type of equipment or its condition, here are some suggestions:

1. Before an item is shipped, there should be an inspection and report that documents the fact that the machine is in good operating condition - you could call it a pre-shipment inspection.
2. Take either a Polaroid or digital photo of the machine and the way it is packaged or crated.
3. When the item is delivered, it should be carefully examined by the receiving department, and any visible damage should be immediately noted on the carrier's bill of lading or delivery receipt. Again, photos are recommended.
4. If there is damage, notify the carrier promptly and request a joint inspection. Save all packaging, crating, pallets, etc.
5. If it is deemed necessary to repair a damaged item, tell the carrier that you intend to do this. Keep accurate records of the labor and materials used for the repair.
6. If the item is damaged beyond repair, you will have to establish the fair market value. This can be the original cost, less a factor for depreciation or, if a used machine is available, the cost to replace the machine with one of similar age and condition. In some cases, it is appropriate to retain an independent appraiser that is familiar with the type of product or machine.

These are some general guidelines, but I hope they will be helpful. In addition, you should be warned that, regardless of the condition of a "used" item, there are many carriers that have liability limitations on used machinery and equipment, often as low as 10 cents per pound.

60) CONTRACTS – LIMITATIONS ON "SPECIAL DAMAGES"

Question: A carrier wants to add the following wording to current and future transportation contracts, stating that it is company policy and must be added:

In no event shall carrier be liable for special, indirect or consequential damages (including lost profits) arising out of or related to carriers services under this agreement.

Are they attempting to contract away liability and is this possible or legal?

Answer: Yes, the carrier is attempting to avoid its legal liability. This is the "special damages" area (see *Freight Claims in Plain English* – 3rd Ed. 1995 at Section 7.3).

Carriers can be liable for special damages if they are "foreseeable" at the time of the contract. Forseeability depends on whether the carrier has actual or constructive knowledge of the consequences of a breach of the contract of carriage. This generally means that if the carrier has notice that there will be specific consequences if goods are delayed or not delivered, and accepts the goods for transportation with that knowledge, you can collect the damages resulting there from.

I would not agree to such language if I were representing a client.

61) DAMAGES – "FREE TIME" TO INSPECT

Question: We had a delivery of 6 mixed content pallets to a 3rd party storage site. The 3rd party wanted to take apart the pallets and inspect every item for damage. The driver refused saying he was only responsible for delivering 6 pallets as stated on the bill of lading and he would not wait around while they inspected the 100+ items. The 3rd party claimed that we have "2 hours free time for delivery and check-in" in the services section of our contract, implying that we own 2 hours of the driver's time for every delivery.

The 3rd party is concerned that they will be responsible for damage - even though they have 96 hours to report concealed damage.

The carrier does not want to stay for 2 hours at every delivery.

I understand that we will not be charged extra until the whole delivery process takes longer than 2 hours.

My question is does the carrier have to stay on site any longer than the time it takes to verify the count on the bill of lading and check for visible damage?

Answer: You have some "apples & oranges" here.

First, without seeing the contract with the carrier I can't tell you what the obligations are.

Second, "free time" usually refers to detention charges for the equipment; after the expiration of the free time, there will be extra charges, usually a certain $ amount per hour or portion thereof. Free time has nothing to do with whether or not the driver observes the receiving process.

Third, it is always best to document OS&D on the delivery receipt while the driver is present, to avoid disputes as to the actual condition of the shipment at the time of delivery. If a driver refuses to wait around until the consignee inspects the shipment, the consignee should take extra care to document any loss or damage that may be discovered.

62) DELIVERY RECEIPTS – NOTATIONS AFFECTING DAMAGE CLAIMS

Question: Does signing a delivery "subject to inspection or count" have validity and give the consignee the right later to file a shortage or damage claim?

Answer: That sort of notation has no legal significance. The consignee would have the right to file a shortage or damage claim in any event. However, if there was no notation as to shortage or damage at the time of delivery (noted on the bill of lading or delivery receipt) the

carrier will probably consider this concealed damage and decline the claim The claimant then would have an additional burden to establish that the loss or damage did not occur after the goods were delivered.

63) DEMURRAGE CHARGES - GOVERNMENT ACTION

Question: We are an importer of lumber products via ocean container. The U.S. Department of Agriculture ("USDA") inspects most of our containers within the free time allowed by the port/steamship company. The problem is that occasionally the USDA does not complete their inspection within the free time and we are held responsible for all demurrage charges and our containers are not released until we pay these charges. This delay is not caused by a problem in the shipment, but a backlog at the USDA in completing their inspections. These charges amount to tens of thousands of dollars each year.

My question is, can we, the importer, be held responsible for these charges since they were a direct result of "Authority of Law", the U.S. Government?

Answer: The answer, unfortunately, lies with your "contract" with the ocean carrier. If you don't have a written Service Contract, your contract is essentially the ocean bill of lading and the tariffs that are incorporated by reference, which provide for demurrage charges once the free time is exceeded. Unless you can negotiate for some relief - or additional free time - the ocean carrier has the right to assess its tariff charges.

I doubt that you have any recourse against the USDA. Even if you could show negligence on the part of the USDA, government agencies such as U.S. Customs, DEA and USDA are usually protected from any liability due to a specific statutory exemption provision in the Federal Tort Claims Act, 28 U.S.C. Section 2680.

64) DUPLICATE PAYMENTS – TIME LIMITS FOR FILING CLAIMS

Question: I am a freight bill auditor. Our duplicate payment claims with a particular carrier have been declined "per Carrier rules and conditions guide item 435; claims for duplicate payment must be received within 15 months of invoice date."

Are duplicate payments governed by the general statute of limitation of the state - per 350 I.C.C.513 (1975)?

Can the carrier legally come up with their own time limit? They are doing this with all of our clients.

Answer: There is apparently no time limit specified for filing a duplicate payment claim in the Federal Motor Carrier Safety Administration (formerly ICC) regulations at 49 CFR Part 378 - Procedures Governing the Processing, Investigation, and Disposition of Overcharge, Duplicate Payment, or Overcollection Claims (the regulations are available online at http://www.access.gpo.gov/nara/cfr/waisidx_02/49cfr378_02.html).

The "180 day rule" in 49 U.S.C. § 13710 would not appear to be applicable since it only applies when the shipper seeks to contest "charges originally billed or additional charges subsequently billed".

On the other hand, assuming the use of a Uniform Straight Bill of Lading that incorporates the carrier's rules tariff, a court would probably uphold some reasonable tariff time limit for filing such claims with the carrier.

This does not answer the question as to whether a lawsuit would be time-barred by an applicable statute of limitations.

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.

65) EXEMPT TRANSPORTATION - APPLICATION OF THE BMC-32

Question: How does the BMC-32 endorsement/coverage apply to Produce Shipments?

Answer: 49 U.S.C. Section 13506, Miscellaneous motor carrier transportation exemptions, lists a number of exempt movements and commodities. Subsection (6)(B) exempts "agricultural or horticultural commodities (other than manufactured products thereof)".

It would be my opinion that, if the commodity ("Produce") falls within this exemption, the Secretary of Transportation has no jurisdiction, and thus the regulations requiring cargo insurance (the BMC-32) would not be applicable.

66) FEDERAL REGULATIONS - LOSS AND DAMAGE CLAIMS

What is the difference between claims administration under section 1005 vs. section 370?

Answer: 49 CFR 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 and freight forwarders.

It was formerly numbered as Part 1005 prior to the ICC Termination Act and then applied to both motor carriers and rail carriers. Part 1005 still exists, but it now only applies to rail carriers.

49 CFR Part 378 is titled "Procedures Governing the Processing, Investigation, and Disposition of Overcharge, Duplicate Payment or Overcollection Claims" and applies to motor carriers and freight forwarders. It is not applicable to loss & damage claims.

These provisions are available online at http://www.gpoaccess.gov/cfr/index.html.

67) FREIGHT BILLS – INFORMATION REQUIRED

Question: Is there a federal law specifying what information is required to be shown on a freight bill?

Answer: There is a federal regulation that specifies the requirements for freight bills:

49 C.F.R. 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:

(1) Names of consignor and consignee (except on a reconsigned shipment, not the name of the original consignor).

(2) Date of shipment.

(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).

(4) Number of packages.

(5) Description of freight.

(6) Weight, volume, or measurement of freight (if applicable to the rating of the freight).

(7) Exact rate(s) assessed.

(8) Total charges due, including the nature and amount of any charges for special service and the points at which such service was rendered.

(9) Route of movement and name of each carrier participating in the transportation.

(10) Transfer point(s) through which shipment moved.

(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.

68) FREIGHT BILLS – WEB BASED BILLING

Question: We just received information that the Union Pacific Railroad ("UP") is going to a web - based bill payment system. They want me to set up a user ID and password to go online to view the bills. They alert me with an email when there is a new bill posted.

I would think that they still have a legal responsibility to "send" the freight bill to the person responsible for paying the freight. Comments?

Answer: As far as I know, there is nothing in the law (Title 49, U.S. Code) or in the regulations (49 C.F.R.) that requires a rail carrier to send a freight bill to the person responsible for paying the freight. In addition, many carriers do bill customers via EDI (electronic data interchange) or some form of electronic billing.

It would seem, just from common sense, that someone should send a bill if they want to get paid, but as a practical matter if you don't comply with the UP's "web-based bill payment system" they will probably cut off your credit.

For your information, there is a federal regulation governing freight and expense bills that applies to <u>motor</u> carriers:

49 C.F.R. § 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:

(1) Names of consignor and consignee (except on a reconsigned shipment, not the name of the original consignor).

(2) Date of shipment.
(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).
(4) Number of packages.
(5) Description of freight.
(6) Weight, volume, or measurement of freight (if applicable to the rating of the freight).
(7) Exact rate(s) assessed.
(8) Total charges due, including the nature and amount of any charges for special service and the points at which such service was rendered.
(9) Route of movement and name of each carrier participating in the transportation.
(10) Transfer point(s) through which shipment moved.
(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 C.F.R. 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.

* * * * *

The carrier shall keep a copy of all expense bills issued for the period prescribed at 49 C.F.R. part 379. If any expense bill is spoiled, voided, or unused for any reason, a copy or written record of its disposition shall be retained for a like period.

69) FREIGHT BROKERS – LIABILITY FOR NEGLIGENT HIRING OF CARRIER

Question: If you are a broker and you get a carrier to pickup a load, is that considered as hiring the driver and truck?

When you hire the driver and truck to pickup a load are you supposed to check license and insurance to make sure they are a valid carrier? And if you fail to check insurance can you be held liable for the driver since you were negligent in hiring him in the first place? I guess what I need to know is what is a broker's responsibility when it comes to the safety of the public by giving loads to uninsured drivers?

Answer: I assume that you are a licensed motor carrier broker.

A broker normally does not have liability for loss, damage or delay to goods in transit. Nor would it ordinarily have liability to a third party injured by the negligence of the motor carrier resulting from a highway accident, or from loading or unloading the truck.

However, there are court decisions that say a broker can be liable for its own negligence, if that negligence causes or contributes to the loss, damage or injury.

As a broker, you should ALWAYS check out the carriers that you use before giving them any loads. You should make sure that they are properly registered with the Federal Motor Carrier Safety Administration (FMCSA) and that they have public liability and cargo insurance in effect. You can easily do this by accessing the FMCSA's website at http://www.fmcsa.dot.gov/and accessing the pull-down menu for Licensing & Insurance.

You should also have written transportation agreements with both your shipper customers and the carriers that you use that clearly spell out the fact that you are a broker, and setting forth the legal duties and responsibilities of the parties.

70) FREIGHT BROKERS - OPERATING REQUIREMENTS

Question: My company Service Transport has recently closed. I have several customers wanting me to set up transport for truckloads and less than truckloads nationwide. What "authorities", "licenses", or "bond(s)" do I need in order to operate legally in all 50 states?

Who do I contact to get all this in order?

Answer: From what you have indicated, you intend to operate as a transportation broker in interstate commerce, which is a business that is regulated under federal law by the Federal Motor Carrier Safety Administration ("FMCSA") (formerly the ICC).

The following is an excerpt from my text *Contracting for Transportation and Logistics Services* that outlines the legal and regulatory requirements:

LEGAL AND REGULATORY REQUIREMENTS

DEFINITION OF BROKER

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

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

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

REGISTRATION

The ICA requires that brokers for the transportation of property must "register" with the Department of Transportation (FMCSA), 49 U.S.C. §§ 13901 and 13904. This registration requirement replaces the former statutory requirement to obtain a "license" from the ICC.

Brokers holding licenses from the ICC as of December 31, 1995 were "grandfathered" and deemed to be registered under the new law, 49 USC 13905.

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

SURETY BOND

FMCSA regulations provide that brokers must file a surety bond in the amount of $10,000, 49 CFR 387.307.

AGENTS FOR SERVICE OF PROCESS

Brokers must also designate agents for service of process for each state in which offices are located or in which contracts are written, 49 CFR § 366.

OTHER REQUIREMENTS

49 CFR Part 371 sets forth requirements for brokers such as record keeping, misrepresentation, rebating and compensation, accounting, etc.

71) FREIGHT CHARGES – "FREE ASTRAY" RETURNS

Question: If the shipper requests that a shipment that was delivered partially damaged to the consignee be brought back for repairs, who is responsible for the charges incurred with the carrier? Is it the responsibility of the carrier to move the shipment back "free astray" for repairs by the shipper, and back to the consignee, or can they legally charge for the transportation move twice?

Answer: There are no laws or regulations that specifically apply to the situation you describe.

Some carriers will bring back goods that are misplaced or damaged in transit to the shipper without charge ("free astray").

As a general rule, if the shipper specifically requests the carrier to pick up and return damaged goods, it would be customary to bill the shipper for the return freight charges. Likewise, if the goods are refurbished or repaired, and the shipper then requests the carrier to re-deliver the goods to its customer, the shipper would be usually be responsible for the freight charges.

This does not mean that the carrier is charging "for the transportation move twice" because they are separate movements, on separate bills of lading.

However, you should be able to recover these additional freight charges (assuming that they are reasonable expenses incurred in mitigating the loss). In other words, the claim would probably have been for the full invoice value of the goods if it had not been possible to bring them back for repair or refurbishment, so the expenses were legitimately incurred in order to reduce the loss.

72) FREIGHT CHARGES – 'SHORT MILES' OR 'PRACTICAL MILES'

Question: A contract was signed with a customer in which the mileage basis was designated as "based on Household Goods Miles as defined in Rand McNally Milemaker System, computerized version in effect on the date of the shipment." An 'authorized representative' of the customer was later asked to further clarify whether 'short' or 'practical' route, and he verbally indicated 'practical'. Time passes, and we start to receive overcharge claims filed by an auditor on behalf of the customer stating freight bills were overpaid due to fact that 'short' route miles should have been paid. We asked for proof of the basis, and a copy of the same mileage item now reads as "based on Household Goods Miles as defined in the Rand McNally Milemaker System, computerized version in effect on date of shipment, short miles to apply." There were no signatures or dates shown on the revised document. What recourse do we have as a carrier?

Note that since this incident, we require that the mileage basis be specifically spelled out in all contracts prior to signing.

Answer: As you have recognized, it is always best to make sure that such matters are covered in a properly drafted transportation contract.

As to whether the "short" or "practical" mileage should govern, it appears that the original contract was silent - or at least ambiguous.

Although laws vary in different states, for certain purposes oral modifications to written agreements can be enforceable. If you can prove that the shipper's representative orally agreed to the use of "practical" mileage, it may well be binding on the parties.

You mention a "revised document", but it is unclear who prepared the "revised document" or whether there was ever any meeting of the minds as to the alleged change in wording. I cannot give any opinion as to that document.

73) FREIGHT CHARGES – "REVERSAL" OF FREIGHT CHARGES

Question: We shipped freight via motor carrier (in 2002 and 2004) with a bill of lading that states the freight charges were to be billed to the customer. When the customer did not pay the freight charges the carrier then said that under the ICCTA Act 1995 49 U.S.C. 13710 (a)(1) they have the right of reversal to make our company responsible for the freight. Where can I find the regulations that state the reversal is legal? Please advise.

Answer: First of all, there is nothing in "the ICCTA Act 1995 49 U.S.C. 13710 (a)(1)" that would authorize a "reversal" of freight charges.

However, in the absence of some other agreement, a shipper remains liable for freight charges, even if the bill of lading is marked "collect", see *Southern Pacific Transportation Co. v. Commercial Metals*, 456 U.S. 336, 102 S.Ct. 1815 (1982).

If you are using a Uniform Straight Bill of Lading, there is a way the shipper may be able to protect itself against additional charges. The bill of lading has a box referred to as "Section 7" which, if signed by the shipper, requires the carrier to look only to the consignee for payment.

I would note that the federal statute of limitations (49 U.S.C. 14705) for a carrier to collect its freight charges is 18 months from the date of delivery. Thus, the carrier could be time-barred if more than 18 months has elapsed.

74) FREIGHT CHARGES – "SECTION 7" NOT AVAILABLE

Question: The Shipper shipped goods "Freight Collect/Bill Consignee" to the consignee. Shipper routinely signs "Section 7/non-recourse" section on bill of lading on such shipments, but there is no such section on this particular carrier's bill of lading. Consignee goes out of business without paying carrier's freight bill. Carrier is now going after the shipper for payment. Is a "Section 7/non-recourse" section required on bill of lading? Any legitimate argument, in your opinion, that since the carrier deleted the standard "Section 7/non-recourse" section from its bill of lading that shipper may not be liable for the charges? Any legitimate argument, in your opinion, that shipper's traffic person did not have authority to enter such a contract with the carrier on shipper's behalf? Can you advise any other grounds for which the shipper may not be liable for payment?

Answer: You refer to "Section 7", the "non-recourse" provision, which is a specific section of the terms and conditions of the "long form" version of the Uniform Straight Bill of Lading as set forth in National Motor Freight Classification.

If some short form bill of lading was used that did not have a "Section 7" box, I think that the only way a shipper could protect itself would be with some explicit language either written on the face of the bill or lading or in some separate contractual document.

The law is pretty clear that the shipper would remain liable for the freight charges, see *Southern Pacific Transportation Co. v. Commercial Metals*, 456 U.S. 336, 102 S.Ct. 1815 (1982).

75) FREIGHT CHARGES – ACCESSORIAL CHARGES ON FREIGHT COLLECT

Question: This question is in regards to who is responsible for paying accessorial type charges from a truckload carrier when the terms are collect and the customer's carrier is used for the shipment. We are a shipper with collect freight terms to many customers and are required to use the customer's carrier. We have no pricing agreement with these carriers and do not know specific charges they assess until the freight bills are received. Detention charges are frequently assessed when a pick up time exceeds 2 hours. If the shipper causes the

loading time to exceed the 2 hours “free” time, are they legally required to pay invoices from these carriers they have no prior agreements with? Also in turn, if the carriers do not adhere to the requirements of the shipper-i.e. not meeting specific appointment times and thereby causing delays in loading; can they invoice these type of charges at their discretion? Is this just a matter for vendor-customer relations since the customer will deduct from vendor invoices if their carriers invoice these charges directly to them? Any advice would be appreciated.

Answer: As I understand it, you are the shipper and these are outbound freight collect shipments going to your customer. The customer’s carrier is used and presumably the customer has some kind of transportation agreement with the carrier.

1. Detention charges must be based on the customer’s transportation agreement with the carrier (or the carrier’s bill of lading and tariff, if there is no contract). Ordinarily the detention charges will be billed to the party paying the freight charges. You should find out what the customer’s contract provides about detention.
2. If you (the shipper) are causing detention charges to accrue (under the contract or the tariff), it would not be unreasonable for the customer to charge these back to your account.

76) FREIGHT CHARGES – ALTERING TIME LIMITS

Question: A company is trying to manage out of period freight charges so, they have asked their third party transportation management provider to include carrier billing time limits in their contracts. (The contracts are between the third party transportation management provider and the carriers, on behalf of the company.) The billing time limits are for original invoices, balance due invoices, and invoices that are rejected back to the carrier for proof of delivery.

Basically, the agreement in the contract says that if the invoice is not submitted within a certain time period; from the ship date (original invoices), from the company close date (balance due invoices), from the company close date (invoices rejected for a POD), the company is not responsible for the freight charges. The time period is less than 180 days. Can they do this? Does this override the statue of limitations since the carrier agreed to these terms and signed the agreement? Are there any new laws regarding how long a carrier has to bill freight charges?

Answer: With regard to motor carrier billing, there are two relevant statutory time limits: the “180 day rule” in 49 USC 13710, and the 18-month statute of limitations in 49 USC 14705.

The statute also provides in 49 USC 14101 that parties may “in writing, expressly waive any or all rights and remedies under this part...”

Thus, shippers and carriers can, in a written agreement, provide for different time limits than would ordinarily be applicable.

77) FREIGHT CHARGES – AMENDMENTS TO AGREEMENTS

Question: We find ourselves in a somewhat questionable situation, being a relatively small company, we seem to take a beating from carriers.

Here is our “riddle/situation”: We have an agreement with a particular carrier, which references a specific tariff.

We also have a letter from the carrier’s account manager which specifically addresses a particular issue (basically the letter states that there will be no charges based on lineal feet), now this carrier has “gone-back” and reviewed paid freight invoices & brought new/additional charges, citing lineal feet & line-haul charges of certain shipments.

I guess my question is: does the carrier have the legal right to void the letter, and use the tariff to charge us?

Can you point us in the right direction on this?

Answer: Without seeing your "agreement" (is it a formal written transportation contract?), I can't give you a definitive answer. Assuming you have a written contract, it sounds as though the letter from the carrier's account representative could be a modification or amendment to the contract. If so, the contract, as modified, would be binding on the carrier and the carrier cannot unilaterally revert to the tariff rule.

As a general comment, I would note that this problem could have been avoided by a properly drafted transportation contract. Also, it is generally not a good practice to refer to carrier's tariffs or incorporate them by reference into a contract. It is suggested that you contact someone experienced with transportation contracts for additional help.

78) FREIGHT CHARGES – BACKHAULS

Question: Regarding customer pickups (backhauls), we know that under Robinson-Patman, we must offer the same allowance to different customers picking up from the same origin going to the same destination and we must allow customers to pickup if they have agreed to the allowance and any pickup rules we mutually agree upon. What we are not clear about is, are there any constraints in effect upon the shipper as to how the shipper derives the allowance offered to the customer? A rather demanding customer has stated that the shipper is obligated by law to offer an allowance equal to what the shipper would pay for-hire carriers. Is there any legal precedent that supports this customer's statement? Can you suggest any references for further research into the entire customer pickup issue?

Answer: The Robinson-Patman Act, 15 U.S.C. 13, allows "differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such puchasers sold or delivered..."

The subject of backhaul allowances came up a number of years ago and, as I recall, the Federal Trade Commission conducted an investigation and issued a ruling. There are also some older court decisions from the 1940-1960 period that deal with freight rates and allowances, including basing points and delivered prices. However, I don't believe there are any federal regulations that would be helpful with regard to this subject.

Obviously there could be a wide range of freight rates applicable to your shipments: LTL vs. truckload rates, full undiscounted common carrier class rates; discounted tariff rates, negotiated contract rates, etc. You may also have delivered prices using averages, zones, mileages or some other formula for the freight factor.

Clearly you should not discriminate between those customers that elect to pickup product at your facility - the same formula for backhaul allowance should be the same for all such customers.

Without researching the subject in depth, I can't really give you a more thorough opinion.

79) FREIGHT CHARGES – BROKER DEFAULT

Question: I have a question regarding a Canadian motor carrier that is seeking payment of freight charges from a U.S. shipper. The Canadian broker has not paid the Canadian carrier, but the U.S. shipper has paid the Canadian Broker.

Any help you can give that will allow me to fend off the motor carrier is appreciated.

Answer: This is an all too frequent scenario when dealing with brokers. The shipper pays the broker, but the broker goes out of business, files for bankruptcy or simply fails to pay the carrier, and the carrier then looks to the shipper or consignee for payment of its freight charges.

As a general rule the law is quite clear that, if you have dealt only with the broker, and have paid the broker, you should not have any liability to the carrier.

80) FREIGHT CHARGES – BROKER DISAPPEARS BUT WAS NEVER PAID

Question: A shipper tenders freight to a broker on a prepaid basis. The broker then hires a carrier to move the freight. The contract between the broker and the carrier states the payment terms are Net 30. The broker goes out of business. The carrier contacts the shipper to find that the shipper has not paid the broker for the freight moved. The shipper tries to get a hold of the broker to pay the freight bill owed but cannot get in touch with the broker. The carrier is asking the shipper to pay them the amount owed from the broker and to pay the broker the difference between what is owed to the carrier and the amount that was originally contracted to do the move. The shipper is refusing to pay anything until they talk to the broker but the broker is out of business. Does the carrier have any recourse against the shipper?

Answer: It is a common situation where a shipper has paid the broker, but the broker has not paid the carrier. In these situations, the general rule is that the shipper would not have to pay twice (no double payment).

If the shipper has not paid the broker, then the problem is that the shipper will be reluctant to pay the carrier since its only contract was with the broker. Thus, if the shipper pays the carrier, it may still have exposure to a claim from the broker (particularly if the broker has filed for bankruptcy).

We usually advise shippers to obtain a release from the broker and authorization to pay the carrier directly to avoid this exposure. Since you indicate that the parties have been unable to contact the broker, this procedure would not seem to be possible.

As an alternative, I would suggest that the carrier offer to give the shipper a letter of indemnity, i.e., an agreement to hold them harmless in the event that the broker subsequently attempts to collect the freight charges.

81) FREIGHT CHARGES – BROKER DISCLOSURE TO CARRIER

Question: We are a licensed property broker and arrange for trucking services for our shipper customers. We negotiate a price with the motor carrier and then quote a rate to our customer. Our "profit" is the difference between what we pay the carrier and what we charge our customer. My question is: do we have to tell the carrier how much we charged our shipper customer?

Answer: The answer to your question can be found in the Federal Motor Carrier Safety Administration ("FMCSA") 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 find out how much you were paid by the shipper.

82) FREIGHT CHARGES – BROKER FAILS TO PAY CARRIER

Question: Company A is a broker that hires a freight company to move goods. The broker is not charging company B for the freight. Company A has not paid the freight company for the shipping of the goods for Company B.

The freight company is now going after the Company B to collect on freight.

According to Company A they have written somewhere that the freight company can not go after payment from their clients.

Clients will not pay invoices because the Freight companies are calling them for payment.

What are the laws governing this type of situation?

Answer: There are usually four parties involved in these transactions: a Shipper, a Broker, a Carrier and a Consignee.

From what you say, it would appear that the Broker has not paid the Carrier, and the Carrier is looking either to the Shipper or to the Consignee for payment.

As a general rule, where the Carrier has extended credit to the Broker and has only dealt with the Broker, it is limited to collecting its freight charges from the Broker. Under the theory of "equitable estoppel", if the shipper has paid the broker, it is not required to pay twice. However, the carrier has the right to be paid for its services and the outcome is dependant upon the facts. (I would note that some carriers and collection agencies will tell you that a shipper or consignee may be liable for the freight charges, but the weight of authority in the court decisions is to the contrary.)

83) FREIGHT CHARGES – BROKER HOLDING FREIGHT HOSTAGE

Question: We are a transportation broker. We gave a shipment to another transportation broker to arrange pick up and delivery. They made the pick up but are now holding the load hostage and put the load in storage. They owe us for an invoice and we have held back that amount from what we owe them. Now they are telling me that unless we pay them in full, plus storage charges, they will sell this truckload of product. They have also contacted the consignee, which is also the owner of the load and made demands that they can pay him for the freight charges under CzarLite tariff, which is about 5 times the agreement made with us. Do they have the legal right to sell this product? Aren't they in violation of some law for not delivering the load as consigned?

Answer: As a general rule, a motor carrier has a carrier's lien on a shipment in its possession for the freight charges that are due on that shipment. In other words; a motor carrier has the legal right to hold the shipment until its charges <u>for that shipment</u> are paid.

A broker is not a motor carrier and does not have a carrier's lien. If a broker is holding a shipment "hostage" for payment of past due freight charges, it is exposing itself to a lawsuit for conversion and damages.

You should advise the owner of the goods to contact a qualified transportation attorney.

84) FREIGHT CHARGES – BROKER PAYMENTS TO CARRIER

Question: What is the legal time period for a broker to pay a carrier for services provided?

Answer: There is no "legal" time period for a broker to pay its carriers. However, most reputable brokers pay their carriers promptly (within 30 days) after the load has been delivered. If a broker is not paying you promptly, you should be very leery of handling more work since it may be an indicator that the broker is having financial problems. If you have a question about a particular broker or a complaint, you may try contacting the Transportation Intermediaries Association (TIA) in Washington, D.C. - phone (703) 329-1894.

Lastly, if you have a serious problem with getting paid by a broker, you may wish to consult a lawyer, and you may have to take legal action.

85) FREIGHT CHARGES – BROKER WITHHOLDING PAYMENT FOR OPEN DAMAGE CLAIMS

Question: We are a trucking company and picked up and delivered a load 6 weeks ago. We contracted this load through a freight broker. There was a claim for damages (the shingles were wet when received) so they are not paying the freight for this load. They are also not paying for the other loads we pulled for them because of this claim. I explained that the claim is between the shipper and us and that they cannot withhold payment for transportation. Who is right?

Answer: You are correct in that the obligation to pay freight charges is separate and distinct from the carrier's obligation to pay legitimate claims for loss or damage.

As a general rule a broker has no liability to its customer (the shipper) for loss or damage, but many brokers find themselves "in the middle", i.e., the shipper refuses to pay them unless the claim is paid. Thus, it is understandable why the broker may be withholding payment of your freight charges.

Unfortunately there is no law or regulation that would prevent the broker from holding payment of your freight charges pending resolution of the cargo claim. Unless you are able to resolve the impasse, your only recourse may be to bring legal action against the broker for your freight charges.

86) FREIGHT CHARGES – BROKER'S OBLIGATION WHEN SHIPPER BANKRUPT

Question: One of my customers just told me yesterday, they filed Chapter 11 bankruptcy. I have $33,000.00 out with them since December 2002.

As a broker, isn't there a new law that states I'm not responsible to pay the carrier in the event I don't get paid from the shipper?

Answer: I am not aware of any statute (new or old) that says a broker does not have to pay a carrier if the broker has not been paid by the shipper.

This is a matter of the contractual agreement between the parties. If your broker-carrier contract conditions your obligation to pay the carrier on receipt of payment from the shipper, you

would be protected against the situation you have described. Otherwise, the carrier will look to you for payment.

You should file a proof of claim in your customer's bankruptcy proceeding in order to preserve your rights as against them.

NOTE: There is a court case asserting that under the "Conduit Theory" a broker might not be liable for freight charges it has not collected from the shipper/payor, depending on the specifics of the relationship between the parties. *Transportation Revenue Management d/b/a TRM v. Freight Peddlers, Inc.*, 2000 WL 33399885, Fed. Carr.Cas. ¶ 84,141 (U.S.D.C. SC September 7, 2000).

87) FREIGHT CHARGES – BUMPING RULE

Question: How far is a carrier obligated to honor the bumping rule when charging a shipper for transportation costs? I had a bill for 13,522lbs, and it would have been cheaper for the carrier to bump it to 20,000lbs. The carrier said they are not obligated to do this all the time and the weight has to be very close to the next bump level before they will do it. I thought the carrier is always supposed to bump it if the price favors the shipper? Is there a tariff rule covering this and if so, where can I find it?

Answer: Where commodities are subject to provisions which 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."

It isn't clear from your question whether the commodities that you shipped 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 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.

As far as we know, provisions of the National Motor Freight Classification are not available online. You have to purchase a copy of the Classification from the National Motor Freight Traffic Association, 2200 Mill Road, Alexandria, Virginia 22314. Their phone is (703) 838-1810 and website is http://www.nmfta.org/. The NMFC is available in hard copy (a large book about 2 inches thick) or on a CD version called "FastClass".

You might get an opinion from one of the classification specialists at NMFTA (contacts listed inside the front cover of the NMFC) or on the website.

88) FREIGHT CHARGES – BUMPING WEIGHT FOR BETTER CLASS

Question: A shipment weighing 461 lbs. was "rated as" 500 lbs. The shipment class, if over 6 pounds per cubic foot ("pcf"), would be class 70 (reinforced rubber hose). The density was shown on the bill of lading ("B/L") by shipper as exceeding 6 pcf. The carrier, using their measurements assessed this as 5.86 pcf and billed as class 150.

The shipper's standard shipping crate should have produced a density of 6.14 pcf. Using the 500 lbs. "rated as" weight, density would have been 6.31 pcf. In other words, a 15 lb. (3.25%) actual weight shortfall has increased the rate 98.5%.

My question is, Can density be calculated on the "rated as" weight to increase density over minimum threshold?

Answer: The following answer is from Bruce Hocum at Rubenstein Logistics.

"The NMFC item he is referring to is 51145. There are no bumping provisions on this item. The density must be 6 pcf or greater. The weight breaks for less than 500 lbs. and over 500 lbs. are used for the weight only, and are not intended to be used to calculate the density. Have the shipper put a 35 lb. brick in the carton - bricks are cheap and you will get a lower rate."

89) FREIGHT CHARGES - CARRIER BILLING CONSIGNEE ON PREPAID FREIGHT

Question: We are a manufacturer/shipper and are having some cash flow issues. As a result, even though our freight is always pre-paid, I have carriers calling us for payment. Once carrier in particular has threatened to bill our customers for their unpaid freight bills.

Can the carrier bill our customers? Is it legal?

Answer: Although you (the shipper) would be primarily liable for the freight charges if the bills of lading indicate "prepaid", it is not "illegal" for the carrier to bill the consignee if the freight charges are not paid.

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.

90) FREIGHT CHARGES – CARRIER HOLDS GOODS HOSTAGE

Question: What legal recourse do I have (as a broker) when a carrier I have contracted with decides that he is just not making enough on the freight, so he decides to hold it for ransom until I pay him triple what we had agreed upon originally?

The State police have been called and they said it was a civil matter. Assume that this is West Coast freight with the destination being East Coast and it is now stationary somewhere in the Midwest in the trucking company's parking lot.

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

If you have some agreement in writing - an acknowledged rate quotation or other shipping instruction - where the carrier agreed to a certain price, you should offer (in writing) to pay that agreed price. If the carrier refuses to release the shipment, then your legal recourse is to sue for conversion.

I would note 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.

91) FREIGHT CHARGES – CARRIER PAYMENT ON CO-BROKERED LOADS

Question: We are a freight broker and we broker loads directly to the intended carrier. At the time the shipment is tendered, we make sure we have an open file, or if it is a new carrier, we set a file up then.

Recently we have had a few instances where our load is co-brokered again by the carrier without our knowledge or consent. In a couple of cases, the carrier did not have a broker's license, but just contract carrier authority.

We have had several instances where we paid the carrier we tendered the load to, but this carrier brokered the load again and then did not pay the actual carrier that performed the move. Of course the actual carrier is now looking to us and our customer for payment. We have declined to pay this carrier, as we should not have to pay the freight charges a second time. Neither will our customer pay the charges a second time.

We want to be sure that if we become aware of a co-broker situation that we will not pay the party that co-brokered the load, but we will only pay the performing carrier. Can you give me an idea of something we can fax to the carrier at the time we tender the freight that will make it clear that if the load is co-brokered, we will contact the performing carrier and deal with them and void our rate confirmation with the company that co-brokered the load.

We only tender freight to company owned equipment or drivers that are under a permanent lease arrangement.

I have a few ideas, however I need your valued opinion on this matter.

Answer: The problem is that you only have a contractual relationship with the first carrier - the one to which you have tendered the load. If that carrier decides to subcontract the work or to "double-broker" the load, you really have no control over the other party.

About the best advice I can give is to hold the first carrier responsible - regardless of whether it performs the actual transportation or not. This could be done with a "hold harmless and indemnification" clause in the rate confirmation.

In other words, the first carrier would guarantee that it would hold you (as broker), and the shipper and consignee, harmless and indemnify against any claims for freight charges if the first carrier has been paid.

But note that while this agreement is binding on the first carrier, it is not binding on the second carrier with whom you have no direct dealings. If the first carrier either files for bankruptcy or simply disappears, the performing carrier is still going to look to you or the consignee for payment.

92) FREIGHT CHARGES – CARRIER SEEKING PAYMENT FROM SHIPPERS ON BROKERED LOADS

Question: We are a third party logistics provider. One of our carriers recently canceled our pricing due to unpaid freight bills that were over 45 days old. They were a carrier of ours for years and this was never an issue before. In our contract with the carrier they refer to us as a broker and state we are responsible for all of our customer's freight bills.

When they cancelled our pricing, they put all the remaining freight charges in a loan with monthly payments. They then went to all our client base and showed them all of our unpaid freight bills, offered them the same discount they were giving us and told all our clients we were not paying our bills and tried to collect for these bills. Is it legal for them to be showing our open invoices and discounts to our client base when we have an agreement to repay these bills by loan? This carrier has also collected freight charges from us in the past when our client has gone bankrupt and we never received the money from our client. In my opinion they are saying

we are responsible for charges if client does not pay us, but the client is responsible if we do not pay them. Any information would help.

Answer: If I understand you correctly, you would like some legal information as to whether the carrier can collect directly from the shipper directly for its unpaid freight charges.

This question of liability for freight charges when a broker fails to pay the carrier comes up frequently.

Liability for freight charges depends on the facts and the relationships among the parties. Unfortunately, the "double payment" problem is very common when brokers go out of business or abscond with funds. This is a "gray area", but the general rule is that if the shipper has dealt only with the broker, and has paid the broker, the carrier cannot come back to the shipper to collect its freight charges. The legal rationale is that there is no privity of contract between the shipper and the carrier; also, that the carrier has extended credit to the broker, and not to the shipper.

You mention a "contract" with the carrier, which provides that your company is "responsible for all of our customers freight bills". It is not clear, however, whether the contract has any language that says the carrier will look ONLY to the broker for payment. If so, the carrier could be in breach of the contract.

I would note that a properly drafted transportation agreement should cover these subjects and preclude the kind of problem that you are experiencing.

You also mention a loan agreement with the carrier, but without seeing the agreement I can't tell you whether the carrier's actions are in violation of that agreement.

93) FREIGHT CHARGES – CARRIER'S LIEN

Question: I had a interchange traffic agreement with a carrier in September thru November - the carrier is holding freight and will not release it to the customer as they want to be paid for delivery from California to Searcy, Arkansas and the return back to California. As far as anyone knows the freight really never left California. The carrier called the shipper and demanded payment of freight charges before they release the freight. After going on the SAFER System I found out that their Authority has been revoked since first notice 9/02 and 2nd 11/02. Their insurance company sent a statement claiming that there is no insurance coverage for said company 3 months after they sent me papers showing us as a certificate holder. I received a letter of authorization to retrieve the product from the carrier, however, all I get is threats of my life and family when I attempt to contact them. I have researched the local phone books and don't know what to do - Please see if there is anything that you can assist me with.

Answer: As explained in a previous "Q&A", a motor carrier has a carrier's lien on a shipment in its possession for the freight charges that are due on that shipment, and has the legal right to hold the shipment until its charges <u>for that shipment</u> are paid. It does not have the right to hold a shipment for other charges on previous shipments. If the shipper tenders the freight charges, the carrier must deliver or release the shipment, or it can be held liable for conversion.

If there is some agreement in writing - an acknowledged rate quotation or other shipping instruction - where the carrier agreed to a certain price, the shipper should offer (in writing) to pay that agreed price. If the carrier refuses to release the shipment, then the legal recourse is to sue for conversion.

I would note that you, as a connecting carrier, are neither the shipper, consignee or owner of the goods. Thus, unless you have paid the shipper's claim for the value of the goods, you technically do not have standing to bring a lawsuit, and it really should be done by one of those parties.

You should advise the owner of the goods to contact a qualified transportation attorney.

NOTE: Since this problem arose in California, the lien law is slightly different. Under the California Civil Code §§ 3051.5 and 5051.6 a carrier can have a lien to cover freight charges on past shipments if it follows the conditions set forth in the Code. More information is needed to determine whether the California law applies to this situation.

94) FREIGHT CHARGES – CARRIER'S LIEN

Question: What are the laws if a shipper issues a bad check, after its parent company (out of the Unites States) goes into receivership? The funds were available when the check was written for previous shipments in the amount of $7,000 on December 7th. However, the bank closed the account prior to the check clearing.

We were contacted by the bank (liquidator) to transport a few loads to a customer and the bank prepaid the shipments, before the last shipment was delivered, we got notification that the check for $7,000 did not clear. What are my rights? I'm holding the freight in a public warehouse until this is resolved. Also, the bill of lading states the owner of record is the shipper and not the bank. The bank says it's not their freight and the shipper states it belongs to the bank. The bank wants me to redeliver the freight back 650 miles. Additionally, the receiver denied the last shipment due to it being one day late.

Answer: I assume that you are an authorized motor carrier and were in the process of delivering the shipment when this problem arose.

A motor carrier has what is known as a "carrier's lien" for the freight charges on a shipment in its possession. This means that you do not have to deliver the shipment unless someone, usually the shipper or the consignee, tenders payment of the freight charges.

You should promptly notify all of the interested parties, in writing, that you are holding the shipment for payment of the freight charges, pursuant to a carrier's lien. Your On-Hand Notice should state the amount of charges (and any storage or other applicable charges) that are due.

If the freight charges are not paid, under the terms of the bill of lading and/or the Uniform Commercial Code, you may have a right to sell the goods in order to recover your freight charges. I would, however, advise you to contact an attorney before doing this.

95) FREIGHT CHARGES – CHANGING NOTATIONS ON DELIVERY RECEIPT

Question: I would like to know how we can be held responsible for the payment of the freight bills for the following.

The delivery receipt was marked PPD on a shipment we received. The original bill of lading shows a third party billing collect. They are now coming to us for payment since the third party will not pay and the original bill of lading was also marked collect.

We also had a shipment come in collect that we were refusing. The driver got off the phone with his dispatcher and said it was changed to prepaid. He crossed out collect on the DR and wrote prepaid. Both parties signed. Again they are coming to us for payment saying "they" were not authorized to change the terms.

In both cases the documents we signed do not show that we accepted the freight charges but rather that the charges were prepaid. How can the trucking companies hold us responsible for payment? What happens if we don't pay?

Answer: As a basic rule, the bill of lading (not the delivery receipt) determines which party will be billed for the freight charges and would have primary liability. This is because the bill of lading is a contractual document. Notations on the delivery receipt are legally irrelevant.

The fact that you refused the second shipment does not relieve you of the obligation to pay the charges, unless your refusal was due to damage to the goods which made them substantially worthless, see "*Freight Claims in Plain English*" (3rd Ed. 1995) at Section 10.9.

96) FREIGHT CHARGES - CHARGEBACKS TO CARRIERS

Question: I would like to know if and how I can charge back to carriers. I know carriers can charge for a truck order not used and I need to know if I can charge them for load not picked up if they have committed to a load. If so, I need to know how I would word this on a contract I would fax to carrier before time of pick up. If they sign this are they liable for the cost. In addition, what is a reasonable price I would be allowed to charge them?

Answer: First, you have to distinguish between carriers' charges for accessorial services and items such as a charge for "a truck ordered but not used". These are tariff charges that are set forth in the carrier's tariff and incorporated by reference into the contract of carriage through the bill of lading.

If you want to charge a carrier for failing to pick up a load, there must be some contractual obligation to do so.

In theory, a verbal agreement to pick up a shipment at a particular place and time could be considered a contract, and the failure to do so could be considered a breach of that contract. The question then would be the measure of damages - most likely the shipper's actual out of pocket expense of acquiring substitute transportation.

If you are using some informal written rate confirmation you could include some language that there would be a penalty if the carrier does not pick up your load at the specified date and time. IF the carrier signs and returns the rate confirmation, it would be contractually bound.

Obviously, the best practice is to have a properly drafted, formal written transportation agreement with all of your carriers, that spells out all of the rates, charges, terms and conditions. The contract could include a provision for a charge (liquidated damages) if the carrier fails to make a scheduled pickup or delivery, or fails to pickup or deliver within a specified appointment "window".

97) FREIGHT CHARGES – CLASSIFICATION DISPUTES

Question: Working in the collection department I came across several cases where the client is contesting the classification of freight. For instance, I have a client that shows NMFC 18260 for 510 lbs on one skid of Plastic auto parts. He contests that the classification should be class 70 but we show it to be class 150. Is there a website that can clarify this disagreement.

Answer: I would suggest that you contact one of the senior classification specialists for the National Motor Freight Classification ("NMFC") at the National Motor Freight Traffic Association ("NMFTA") in Alexandria , Virginia for an opinion:

George M. Beck (703) 838-1813
Daniel E. Horning (703) 838-1820
William F. Mascaro (703) 838-1834

You can also try their website: http://www.nmfta.org. For a more detailed understanding of freight classification, the NMFTA offers one-day seminars at various locations around the country.

98) FREIGHT CHARGES – COLLECTING FROM BROKERS

Question: What is the best way for a contract carrier to collect unpaid freight invoices from brokers? (Calling has gotten nowhere, not even return phone calls in one case) Is there a government agency that handles complaints regarding brokers not paying their freight bills? Can a claim be filed against a broker's bond and if so, does a lawsuit have to be filed and/or judgment reached first, or can a letter be sent to the bond company prior to filing suit to collect the freight charges? Can a suit be filed in small claims court, or does it have to be filed in federal court because of diversity jurisdiction, etc. We are talking about very small claims here - all under $1000 each, so they are not really worth hiring an attorney to deal with them. Any guidance you can give in this area would be greatly appreciated - and if there is a book or website that would answer these questions and/or provide forms to use, that information would also be greatly appreciated.

Answer: It is a recurring problem that some brokers either fail to pay their carriers or are extremely slow in paying. Other than pressuring the broker for payment, your only remedy may be to (1) file a suit for collection of your freight charges or (2) file a claim against the broker's surety bond.

You should be able to sue the broker in your local small claims court. An action for freight charges can be brought in any court (state or federal), and you should be able to get jurisdiction over the broker wherever he does business. I would also note that brokers are required to have registered agents for service of process (BOC-3 filing) and this information is available on the FMCSA website.

Brokers are also required to file a surety bond (BMC 84) and this information is also available on the FMCSA website. Most broker surety bond companies will respond to a written claim from the carrier and will not require that the carrier first obtain a judgment against the broker, but we have heard of one that did require the carrier to have a judgment.

The FMCSA website is www.fmcsa.dot.gov and the registered agent and surety bond information can be found by accessing the "licensing and insurance" section.

99) FREIGHT CHARGES – COMMERCIAL ZONES

Question: We are looking for information on the Apparel Vendors "Commercial Zone" shipping policy or law.

Generally this is that an apparel vendor shipping from a point located within a 50-mile radius of either NYC or LA must pay the freight cost to ship the goods to another point within this zone. It could either be the final destination or to the retailer's consolidator. There is some confusion as to whether both parties need to be in a 50-mile radius of each other, or if it applies when both parties are located in the zone - even if the shipping and receiving locations are more than 50 miles apart.

The majority of the retailers' Routing Guides contain reference to this policy. Even if our freight terms are collect with a particular retailer, the commercial zone policy overrides the collect terms. In that case we would pay to the consolidator and then the retailer would pay the freight to the final destination.

I have been checking online and calling anyplace that seemed related and can find nowhere that this policy is mandated by any official agency. I cannot even find a reference except in the retailers guides. There are references to commercial zones - but not in reference to apparel or the responsibility for freight payment. I spoke to someone with the DOT who referred me to your site for assistance.

So, to my question - Is there a law or published policy that defines this Commercial Zone policy and mandates our compliance? If so, could you direct me to a published version for specifics? Any assistance you could provide on this issue would be greatly appreciated!

Answer: In the field of transportation "Commercial Zones" are a relic of the old ICC economic regulation over the rates and charges of motor carriers, and were defined areas surrounding municipalities that were exempt from regulation, i.e., the requirements to publish and file tariffs, etc. with the ICC.

These exemptions were carried forward after the ICC Termination Act of 1995, and are now found in the FMCSA regulations at 49 CFR Part 372.

The retailer policies that you have described appear to be something entirely different - more a custom of the particular trade or industry. I am not aware of any "official" or governmental law or regulation that would define these or be applicable.

100) FREIGHT CHARGES – CONSIGNEE LIABILITY ON PREPAID SHIPMENT

Question: Our Sheriff's Office paid a food agency in Garland, Texas to deliver a sizeable food order to us. They fulfilled their contract and were paid in full. However, apparently they never paid their transporter, Central Transport International, Inc., the $1,843.26 shipping bill and the food agency has now declared bankruptcy. Central Transport has hired The Snyter Resource Group, LLC, to collect the unpaid bill from us.

Needless to say, this is not a subject area that we are familiar with. Since you protect transport consumers, and we are a transport consumer, can you give us any advice or assistance in this area? Any help you can give is most appreciated.

Answer: Since this was apparently a "prepaid" shipment, the shipper would have primary liability for the freight charges.

As for billing the consignee, a consignee may be liable for freight charges on the theory that it has received the benefit of the transportation services. However, there is 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.

101) FREIGHT CHARGES – CONSIGNEE'S LIABILITY

Question: We are a manufacturing company in Oklahoma. Some of our raw products come from British Columbia, Canada. The shipments are brought by motor freight and weigh around 4500 to 5000 pounds.

We order the product from the supplier in British Columbia and the product is always sent "Prepaid". When we receive our invoice from the supplier the freight charges are included in what we pay. We have now received two notices from a motor carrier asserting that we owe them shipping charges from a shipment in July.

We have paid our supplier for that shipment in full and I have the invoice and the canceled check. Now the motor carrier is turning the matter over to a collection agency saying that because the supplier has not paid them, we must pay the cost.

Is this right? We have already paid the freight. What can we do to get the collection agency and the motor carrier off our back? Any help would be appreciated.

Answer: Since this was a "prepaid" shipment, the shipper would have primary liability for the freight charges.

As for billing the consignee, this is unfortunately a common question. 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 liability for "double payment" 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.

102) FREIGHT CHARGES – CONSIGNEE'S LIABILITY

Question: A customer (shipper, consignor) called us to pick up a load at their facility and deliver to their customer (consignee). We picked up the load and delivered to that customer (consignee). However, we have yet to be paid by the shipper (consignor). Section 7 was not signed. Do I have a right to collect the freight charges from the Consignee?

Answer: I will assume that this was a "prepaid" shipment as noted on the bill of lading, so that the shipper would have primary liability for the freight charges.

As for billing the consignee, a consignee may be liable for freight charges on the theory that it has received the benefit of the transportation services. However, there is 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 the consignee purchased 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 the consignee should not have to pay the carrier.

103) FREIGHT CHARGES – CONTESTING OVERCHARGES

Question: Is the carrier required to tell the shipper that an overcharge claim must be filed in 180 days? We are disputing a bill, have contacted the carrier numerous times by phone asking for an explanation of the bill, and we are past the 180 day limit. No one mentioned that our dispute needed to be in writing.

Answer: The so-called "180-day rule" set forth in a federal statute (49 U.S.C. 13710) that applies to claims for undercharges and overcharges:

> (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.

As you can see, the statute does not specifically state that the shipper must contest the carrier's invoice *in writing*. I don't believe that there are any court decisions dealing with this question, but it would certainly be a good practice to document any claim or disputed freight bill in writing.

104) FREIGHT CHARGES – CONTRACT RATES

Question: We based our LTL contract rates on Consolidated Freightways (CF) tariff rates from several years back, and then negotiated discounts with the LTL carriers on top of that. Now that CF is out of business, should we use another standard to base our contract rates on?

Answer: In theory, you shouldn't have been using CF's tariff with another carrier unless they were a participant in that tariff, but that is "water under the bridge" at this point.

Many parties are using the CzarLite tariffs for their base contract class rates and the CzarLite tariffs are generally accepted by most LTL carriers.

The CzarLite tariffs are a proprietary product available from SMC3 (Southern Motor Carrier Conference) and you can get info at www.smcsystems.com or call them at 800-845-8090.

105) FREIGHT CHARGES - CORRECTIONS TO FREIGHT BILL TERMS

Question: I have a question concerning corrections to charges after delivery of freight. Example - Shipper fills out a (prepaid) bill of lading. Tenders this freight to Carrier "A", Carrier "A" turns this freight over to the carrier that is going to make final delivery. The freight is now delivered to the consignee on a (prepaid) basis. Almost 2 months after this move, the shipper is now coming back stating this should have been a collect move. If the consignee does not accept the correction to these terms – is there any recourse against this consignee? Carrier "A" is now trying to collect (by overhead billing) to the consignee and claim they will pursue them thru legal collections if they do not pay the bill.

Answer: First of all, it is pretty obvious that the shipper is primarily liable for the freight charges. It is also apparent that the shipper caused the problem by incorrectly preparing the bill of lading.

The carrier could attempt to re-bill the consignee, but it is likely that the consignee would have a defense. 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.

There are questions of fact that must be resolved, specifically, did the consignee already pay for the freight charges, and if not, is it actually liable for them. In either event, the carrier is entitled to be paid for its services.

106) FREIGHT CHARGES – CREDIT PERIOD

Question: What is the standard terms for payment once a customer is billed, 7, 15 or 30 days?

Answer: The regulations of the Federal Motor Carrier Safety Administration (formerly the ICC) at 49 CFR Part 377 specify a credit period of 15 days (including Saturdays, Sundays and holidays) from presentation of the freight bill. This is a "default" credit period, and the regulations specifically allow carriers to modify this in their tariffs, up to 30 days.

Also, most shipper-carrier transportation contracts have longer periods - typically 30 to 45 days.

107) FREIGHT CHARGES – DEMURRAGE FEES AND "FORCE MAJEURE"

Question: We have a question regarding demurrage fees incurred on two (2) recently imported containers. Incoterms are that we take possession of the goods once the containers reach the Port of Miami. These particular containers came from China and arrived via the ocean carrier on Saturday, September 10th.

The containers were then unloaded on the 10th and cleared through Customs on Tuesday, September 13th. The shipping line released the containers on Wednesday, September 14th and our last "free" day was on Friday, September 16th. The forwarder cleared the shipment on Friday, September 16th.

Once the weekend concluded, we had a two-fold problem. Many of the independent drivers either signed up with the Teamsters or didn't report to work for fear of repercussions from the Teamsters picketing at the port.

Consequently, ALL of the drayage companies in Miami were far understaffed to handle all of the container volume. Secondly, the port was closed for the hurricane for most of the day on the 16th and all day on the 17th. As a result, our containers didn't get picked up until September 26th.

Our invoice from the forwarder includes the following charges:

PAID TO CARRIER: 10 DAYS DEMURRAGE FEES	$1,600
PAID TO PORT OF MIAMI: 10 DAYS DEMURRAGE FEES	$ 645

Is it standard procedure that both the port and the carrier assess demurrage fees? If so, do we have any grounds to claim "Force Majeure" to get some or all of the demurrage fees waived?

Answer: It would appear that your company assumed responsibility for returning the containers within the free time, and for any demurrage that would be charged in the event of a delay in returning the containers.

I am not familiar with the Port of Miami, or why it would also be entitled to any demurrage fees.

The carrier's demurrage charges would have to be set forth in the carrier's tariff and/or the terms and conditions of the interchange agreement. Without reviewing such documents, I can't advise you as to whether the conditions you described (labor disputes, hurricane) would be exceptions or defenses to the per diem charges.

About the best suggestion I can give you is to discuss this with the forwarder and ask for backup for the charges; ask them if the charges can be negotiated.

If you want to pursue this further, you might want to contact a maritime attorney in the area.

108) FREIGHT CHARGES – DEMURRAGE

Question: I'm not sure if you can help us; but we had a transportation issue in 2004 that has not resolved itself as yet and we are looking for more definitive information.

Basically, and I can provide background notes, we requested a Charleston, South Carolina drayage firm to pick up containers at the Maersk port of Charleston and deliver them to our warehouse in North Carolina by a certain date.

It was never done and no one ever called to tell us they were having equipment problems at the port. After about a week past the last free days we called our warehouse to confirm receipt of all the goods and discovered the problem.

We incurred $10,000 in demurrage to the S/S line and now we are being asked to pay the drayage company another $5,600 for inadequate services.

What is our recourse? In our 30 year history we have never had such poor service.

Answer: I hesitate to give an answer without reviewing all of the relevant facts and documents.

From what you have said, it appears that the motor carrier (drayage firm) agreed to pick up your containers and to deliver them in a timely manner (with "reasonable dispatch"), but failed to do so.

While this is not the usual type of claim for delay, it would seem to me that the drayage firm is in breach of its contract and should be liable for any reasonably foreseeable damages, including at least a portion of the demurrage that was assessed by the ocean carrier.

I would, however, question whether your company is free from fault if it took so long to discover that there was a problem.

109) FREIGHT CHARGES - DETENTION CHARGES

Question: We accept scrap tires for use as an alternate fuel. We receive a tipping fee for this disposal service from our customer. We receive the scrap tires by truck. Generally, our customer arranges for the shipping of these scrap tires via a common carrier and they pay the carrier. If the tires are not unloaded right away, we "store" the trailer filed with tires until we can empty it and then contact the shipper/transporter that the trailer is ready for pick-up. If our customer, the shipper, does not pay the transporter/common carrier or there are demurrage charges incurred because of the delay, are we liable for the charges directly to the transporter or must the transporter try to collect from the customer/shipper and in turn, we may be responsible to our customer for these charges depending on our contract with him?

I understand the rationale for a consignee being held liable because he received the benefit of the transportation services. However, in this case, we are a service provider to our customer and not a purchaser of goods (in other words, we are not the "customer" as in the typical case of a consignee).

Does it make a difference if the trailers were originally loaded in Puerto Rico and delivered to South Carolina via the port in Jacksonville, Florida?

Answer: There are two separate contractual relationships here, one with the carrier(s) that transport the shipment, and another with your supplier.

If the shipment is moving in an ocean container, the ocean carrier will have demurrage or detention charges in its tariff, and will generally look to the motor carrier under the terms of its equipment interchange agreement if the container is not returned within the free time.

If there are such charges from the ocean carrier, the motor carrier will obviously seek reimbursement from either the shipper or the consignee.

The motor carrier may also have a tariff that includes provisions for accessorial charges such as trailer detention. Depending on the bill of lading (or other written transportation contract), the

carrier may have the right to charge and to enforce its detention charges against either the shipper or the consignee. While a shipper is generally considered to be primarily liable for freight and accessorial charges, a consignee can be liable for detention charges.

Lastly, without looking at your contract with the supplier, I cannot tell you which party would have responsibility for trailer detention. If this is not covered by the contract, it should be.

110) FREIGHT CHARGES – DISCOUNTS ON INBOUND COLLECT

Question: Isn't there a rule of some kind that a carrier has to allow at least a 30% discount if they get a shipment charged to a customer who has no discount set up?

A vendor sent us a shipment on a collect basis via a carrier with whom neither they nor the manufacturer had a discount in place and we were charged an undiscounted rate.

Answer: Since "deregulation" there are no rules about what a motor carrier can charge for its services, and the Federal Motor Carrier Safety Administration does not have jurisdiction to determine the reasonableness of rates and charges (as the ICC did in the "good old days").

Most LTL carriers automatically give some discount off the full tariff class rates, and shippers that contract with carriers generally negotiate discounts as part of their contracts.

I suppose you could challenge the bill as being unreasonable and see if you can negotiate a better deal. Other than that, "caveat emptor".

111) FREIGHT CHARGES – EXCESSIVE TRAILER DETENTION RATES

Question: We were billed for trailer detention rates of $250.00 per day through a third party provider. The charges were for two trailers that had to be inspected by United States Customs officers at the Port of El Paso, Texas. The trailers were held for approximately 5 working days each unit.

My question pertains to the excessive trailer detention rates. Is this legal? I pay $60.00 per sea container off a rail car per day detention.

I thought that that there were still requirements to file tariffs with the DOT as far as rules and regulations were concerned.

Answer: If these are normal over-the-road trailers belonging to a motor carrier, I would agree that $250 is quite excessive.

In any event, your obligation to pay detention charges would have to arise under some kind of a contract - either an agreement with the intermediary or the carrier. I would suggest that you demand a copy of the applicable ("unfiled") tariff, schedule of rates, or other agreement that governs the rates for trailer detention.

112) FREIGHT CHARGES – FEES FOR DRIVER ASSIST

Question: I have a customer that ships prepaid on a standard short-form bill of lading. In the past, they had trouble verifying "Driver Assist" charges. To solve this, they added a field on their bill of lading that requires the consignee to initial if driver assist was performed. In most cases this works, but one carrier in particular continues billing for driver assist without getting the consignee to sign off. If a carrier does not get the consignee to initial for the service, can the shipper legally be required to pay for it?

Answer: Assuming that the carrier has a valid and applicable charge for "driver assist" with unloading that is set forth in its rules tariff, AND the driver actually performs this service, it has the right to collect these charges from someone - either shipper or consignee.

Whether or not the consignee initials the box on the bill of lading or delivery receipt, it is really a factual question: did the driver assist or not. If you think you are being billed for a service that was not performed, you should get a statement from the consignee and furnish it to the carrier.

113) FREIGHT CHARGES – FINES FOR IMPROPER WEIGHT

Question: The shipper noted the total weight on bill of lading as 42,000 lbs.

When the driver was stopped by DOT, the actual weight was 47,000 lbs. The driver is fined, and detained. We had to get 5,000 lbs. off the truck, but the DOT will not let him return 100 miles to the shipper (origin). The shipper says the driver should have gotten weighed sooner. The driver says shipper should be accurate in weight on bills of lading. Who is responsible for paying fines and costs incurred in getting load legal?

Answer: The motor carrier has the primary legal liability for operating overweight. As a general rule, if there is any question whether the load was legal, the driver should have either refused to accept the load or had it weighed before venturing out on the public highways.

However, under the circumstances you have described, it is possible that the motor carrier might have some recourse against the shipper if the shipper intentionally or negligently mis-stated the weight.

114) FREIGHT CHARGES – FUEL SURCHARGES, TARIFFS & CONTRACTS

Question: 1. Are handling charges subject to Fuel Surcharges? When invoicing what exactly does the Fuel Surcharge get attached to?

2. Can a shipper list a CZARLite tariff for use in a contract if we already have a filed tariff and the shipper is not authorized by SMC to use the CZARLite tariff? The CZARLite tariff is also over 5 years old and the shipper refuses to release a copy to the carrier.

3. We have several contracts with shippers but we also have a filed tariff. I have a shipper that keeps telling me their contract overrides our tariff and the attachment we submitted with their contract stating our handling charges, detention charges, etc. Which do I bill by, my tariff or their lower priced contract?

4. Several shippers interline with other contract carriers and they interline this freight with us. We in turn bill the carrier, not the shipper, but the carriers are not paying. Can we invoice the shippers?

Answer: Let me try to answer your questions in the order presented.

1. Fuel surcharges should be applied to the actual transportation charge only, and not to any accessorial charges. If you are using a discounted class rate for LTL shipments, the surcharge is applied to the discounted (net) charge, and not to the undiscounted charge.

2. Shippers and carriers can use any version of the CzarLite tariffs that they agree on in their transportation contract. SMC3 may have a requirement that the shipper or carrier purchase a copy of their proprietary tariff materials, but that doesn't affect the contract between the shipper and carrier.

3. If you have a binding transportation agreement between a shipper and carrier, the terms and conditions of the contract will govern. Whatever rates and charges, including accessorial charges, that are set forth in or attached to the contract will be applicable, and should be enforceable by either party to the agreement. If the contract expressly incorporates by reference a tariff (such as CzarLite) or some other schedule of rates and charges, then they become part of the contract.

4. The contract of carriage is between the shipper and the carrier that receives the goods and issues a bill of lading. When shipments are interlined, it is under a contractual arrangement between the receiving carrier and the delivering carrier. The delivering carrier only has a contract with the receiving carrier, and not with the shipper. Thus, once the goods are delivered and its carrier's lien is extinguished, the delivering carrier can only look to the receiving carrier for payment of its charges.

115) FREIGHT CHARGES – GOODS HELD HOSTAGE

Question: We have a trucking company that we have used based in Texas. They have hauled several loads for us and currently have two to three of our customer's loads still on their trucks.

We discovered yesterday that they have been brokering out our loads to other trucking companies. Curiously enough, they don't have broker authority.

Also, they signed our Carrier-Broker agreement that says that this would be a breach of our contract, thus entitling us to withhold payment in full or a portion thereof for breaching our rules. Regardless, we confronted the carrier and asked them if they have been brokering our loads, and if not can they explain why other trucking companies are signing the Proofs of Delivery?

The dispatcher with whom we booked all of our freight, flat out lied to me when I asked him if they have a broker division or some connection to a broker. Well they do, MC number xxxxxx is a broker at the same address as this carrier, and owned by the same owner as the carrier. To make a long story longer, I called and spoke to the owner and told him I could not pay him on those invoices until I got a release or something from the actual carriers saying they had been paid on these delivered loads, so we would not end up in a double payment situation down the road. He said he would cooperate so long as we paid him on some of the open invoices, which he claims moved on his own trucks.

Today we got a call saying that they would not deliver the freight that is still on their trucks unless we paid them some additional money from other invoices that they still have with us. When my carrier rep told me this I called their attorney out of El Paso, Texas to let him know that his client is creating a problem bordering on extortion.

Long story short, they have two or three loads belonging to our customer that were supposed to deliver tonight and Monday. According to the owner, if I don't figure a way to get him paid on the older invoices and work out with his attorney how he is going to get paid on the new ones yet to come, he will not deliver our freight on time.

I know I can pay him and pray he delivers my loads so my customer does not have to suffer because of my dispute, but I also have no assurance that he won't just call back and ask for more money.

What do you suggest? What if anything can I do legally, or with the DOT? The trucking company brokered our loads to another company (owned by the same person) without having a broker license or authority. I want to be practical about this as well before I start calling the police and reporting my loads stolen. If you have some time, would you mind giving me some advice on this?

Answer: It is not unusual for carriers to hold freight "hostage" for unpaid freight charges. However, the general rule is that a carrier's lien only applies to the freight in its possession, and not to prior shipments.

Under the common law, which has been codified in the United States in Section 7-307 of the Uniform Commercial Code, a carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods. Such charges include transportation, storage, and expenses necessary for the preservation of the goods incident to their transportation.

As a general rule, the carrier's lien applies only to the shipment in transit ("covered by a bill of lading"), and not to other or prior shipments. The carrier must deliver the shipment upon an offer "in good faith to satisfy the lien of the carrier on the goods...", see 49 U.S.C. Section 80110 (Federal Bill of Lading Act).

One case often cited is *Southern Pacific Transportation Co. v. Commercial Metals Co*., 456 U.S. 336, 102 S.Ct. 1815 (1982):

> Furthermore, it is by no means clear that SP could safely have deferred delivery of the second and third cars until after Carco had paid the charges on the first car. The carrier's lien for unpaid charges covers only the goods in the immediate shipment. 49 U.S.C. § 105. See *Atlas S. S. Co. v. Colombian Land Co.*, 102 F. 358, 361 (CA2 1900).
>
> Once Carco offered to pay the charges on the second and third cars, even serious suspicion about Carco's financial health might not have allowed SP to withhold delivery without risking liability to Carco for conversion of its goods. See 49 U.S.C. § 88 (carrier's duty to deliver goods on demand).

Your recourse in the situation you have described is to: (1) tender the freight charges for the shipments that the carrier is holding; (2) if it will not deliver or release the freight, have your attorney obtain an order to show cause demanding immediate release of the freight, and (3) bring a suit for conversion (a tort, so you would be entitled to consequential damages and possibly attorney's fees).

116) FREIGHT CHARGES – INCORPORATING LIMITATIONS ON OVERCHARGE CLAIMS

Question: I understand the Federal statute of limitations for rail overcharge claims to be 3 years. Our customer has a contract with one of the railroads that refers to a rules tariff with this language:

Claims for overpayments (including duplicate payments) for freight charges must be filed in writing within twelve (12) months from the date of the original freight bill. Suits for the recovery of overpayments of freight charges may not be instituted later than two (2) years from the date of the original freight bill. Overpayment claims or lawsuits for less than $100.00 per freight bill shall not be filed and no claim shall be paid if the overpayment is found to be under $100.00 per freight bill.

Does their rules tariff override the Federal statute?

Answer: The federal statute of limitations, 49 USC 11705, provides that a civil action to recover overcharges must be brought within 3 years after delivery of the shipment.

I assume the shipper entered into a written transportation agreement with the railroad, and that the agreement expressly incorporated the carrier's rules tariff by reference, or as a "governing publication".

There is nothing in the statute that prohibits parties from contracting for a shorter period for the recovery of overcharges. Thus, I would think that the time limit for overcharge claims and suits would be enforceable.

I would note that this is one of the dangers of incorporating a carrier's tariffs into your transportation agreement.

117) FREIGHT CHARGES – INSULATING 3PL

Question: We are a 3PL. We have a client that we no longer want to extend credit terms to and do not want to incur any freight liability. We do need to ship out the client's product and

would like to know what options we have for shipping the product out on the client's freight account pre-paid to the client's consignee and not putting our company at risk for the client not paying the freight carrier.

Will putting the Client as the shipper using one of our facility location addresses insulate us from the freight company coming to us asking for freight payment should the client not pay the freight carrier? Should we sign the out-bound bill of lading as an agent of the client?

We do not own the inventory and we get paid for providing fulfillment and storage services. We do not mark up freight. In this case, we will not allow the client to ship on our freight accounts. We will have to arrange a pick up time with the freight carrier.

Do you believe we have a freight liability issue with the freight carrier?

Answer: As a general rule, the bill of lading is considered the "contract of carriage" and the parties named on the bill of lading as the shipper and the consignee are the parties liable for the freight charges.

I would think that putting the customer's name down as the shipper on the bill of lading, and having the freight bills sent directly to the customer should insulate your company from liability. In fact, it would probably be a good practice to follow this procedure for all of your accounts.

118) FREIGHT CHARGES – MILEAGE DETERMINATION

Question: If there is an agreement that "Mileages associated with rates set forth in Exhibit C shall be determined by using Rand McNally-TDM, Inc.'s TDM MileMaker Resident System, version STB HGB 100-G, HHG Mileage Guide No. 18 and any subsequent revisions to this guide", do you apply "short" route miles or "practical" route miles?

Answer: I assume you are quoting language from a transportation contract, and that the contract does not specify "short" or "practical" route miles, thus creating an ambiguity.

As a general rule of tariff construction (when we still had filed tariffs and an ICC), a shipper is entitled to the shortest mileage or distance when the rate is dependent on distance.

Unless there is some other agreement between the parties, or an established course of dealing, such as prior invoices and payments, I would suggest that the shortest mileage should apply.

Note that a properly drafted agreement would have addressed this issue.

119) FREIGHT CHARGES - MINIMUM CHARGES WITH MULTIPLE BILLS OF LADING

Question: What role does a bill of lading have in the handling freight? The situation is we have a client that books freight for their clients. They issue a load number to handle a specific load amount that will be shipped out. However, when we pick up the freight the customer gives us two bills of lading. We are currently generating two invoices and treating the shipments as separate with separate minimum billing. The client argues these should be combined and only one minimum charge should apply. What is the right way to handle a shipment with two separate bills of lading?

Answer: I would assume that the answer to your question may be covered in your carrier's rules tariff, and suggest that you look there.

A "shipment" is defined in Item 110 of the National Motor Freight Classification as "...a lot of freight tendered to a carrier by one consignor at one place at one time for delivery to one consignee on one bill of lading". Thus, if the freight is consigned to different consignees, then there would be two bills of lading, and each would be separately rated.

120) FREIGHT CHARGES – MULTIPLE BILLS OF LADING TO SAME CONSIGNEE.

Question: We manufacture product under various trade brands. It is possible for us to ship from one manufacturing location to one of our distributors, one order of one trade brand and another order of another trade brand on the same truck. We are required to generate a separate bill of lading (B/L) for each trade brand order because of marketing requirements (ours internally). The problem is the carrier is billing us for a stop-off even though the goods are being delivered to the same address, because of separate B/Ls. Can or should they be doing this?

Answer: From your description of the problem I would say that the carrier can bill for two separate LTL shipments, but not for a "stop-off". Thus, for smaller shipments you might have to pay the minimum charge on each shipment. Also, note that some carriers have multiple shipment rates that apply from one shipper to one consignee - you might want to check this.

121) FREIGHT CHARGES – NO PAYMENT FROM BROKER

Question: We are a carrier that moved several loads arranged by a broker. The broker failed to pay us for two loads and we want to know whether a carrier can collect from the shipper or consignee if the broker that arranged the move goes out of business or fails to pay the carrier?

Answer: Unfortunately, this question of liability for freight charges when a broker goes out of business comes up too often. Liability for freight charges depends on the facts and the relationships among the parties. It is also important to note that the analysis changes if the broker files for bankruptcy protection in the court, rather than simply does not pay.

Regrettably, the "double payment" problem is very common when brokers go out of business or abscond with funds. This is a "gray area", but the general rule is that if the shipper has dealt only with the broker, and has paid the broker, the carrier cannot come back to the shipper to collect its freight charges. The legal rationale is that there is no privity of contract between the shipper and the carrier; that the carrier has extended credit to the broker, and not to the shipper; and also that (assuming the shipper actually paid the broker for the service) the shipper should not have to pay twice.

If the broker was never paid for the move it is possible for the carrier to seek payment from the shipper or consignee on the basis that they benefited from the service provided. However, insofar as the payor of the freight charges has a primary obligation to pay the broker, you, as the carrier, may be asked to sign a release and indemnification agreement would protect the payor should the broker seek to collect its fees.

If the broker files for bankruptcy, the matter is complicated because the bankruptcy estate will demand that it be paid all monies due the broker, and it will seek to recover any monies paid by the broker within 90 days prior bankruptcy filing as preferences claims.

I would suggest that you see if the broker has a surety bond on file with the FMCSA, and submit your claim to the surety company.

122) FREIGHT CHARGES - OCEAN CARRIER LIEN ON GOODS

Question: I am ocean freight broker, an entity that is engaged by a carrier to sell or offer for sale ocean transportation services.

We worked exclusively with one NVOCC for almost 2 years in household goods. During our working relations in accordance to the carrier's procedure we have received a 22.5% fee for our work.

The balance is paid directly to the carrier In October the carrier requested that we lower our fee to 20% so they might lower their rates and secure more shipments. As an incentive to us,

the carrier also promised a bonus type structure where if we lowered the fee collected (to 20%) for sale and marketing, they would guarantee us an increase in revenue by offering an additional bonus payment, on completion of each move. Such additional bonus payment was to be equal to 50% of the profit generated per move, less the 20% sale commission received up front (the customer deposit).

The issue or idea of us paying the carrier any part of our base fee (the 20% commission) if the carrier lost profit or faced financial difficulties was never agreed to or even considered.

Due to poor service from the carrier, and many customers' complaints we decided to sever the relationship with the carrier.

Thirty days after we ceased working with the carrier, the carrier faxed an invoice to us for the amount of $25,000.00 for their loss of profits on the shipment (for the months of Nov-March). We never agreed to these arrangements and have advised the carrier that these invoices are in dispute.

The carrier (less then a week after faxing over these invoices) placed all shipments on hold (even past shipments that are not in dispute). Is this legal?

Can a carrier place a lien on customer's cargo when they have been paid in full by the customer because they are claiming money is owed to them by their own sales agent?

Are they allowed to hold past shipments for current balance they claim such agent owes them?

Are they not required to follow some legal process prior to placing any shipments on hold?

Answer: Without reviewing all of the contractual arrangements between your company and the NVOCC, I can't give you an opinion as to whether they are entitled to their claim for "loss of profits".

As to the lien for freight charges, as a general rule, a common carrier has a carrier's lien on a shipment in its possession for the freight charges that are due on that shipment, and has the legal right to hold the shipment until its charges are paid. It does not have the right to hold a shipment for other charges on previous shipments. If the shipper tenders the freight charges, the carrier must deliver or release the shipment, or it can be held liable for conversion.

123) FREIGHT CHARGES – OFF BILL DISCOUNTING

Question: Is it a legal for a company that is shipping their goods to make revenue from the shipping charges that they pass along to their customers? For example, I pay a carrier a dollar to haul something but I in turn charge the customer $1.10.

If a shipper is charging more for the freight than they actually pay for the service do they assume any legal responsibility acting in part as a carrier or 3PL - in effect they are generating revenue on the shipping of material?

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 Interstate Commerce Commission ("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”.

With regard to increased liability resulting from this practice, no - I don't see how the shipper could assume any liability as a carrier or 3PL.

124) FREIGHT CHARGES – OFF BILL DISCOUNTING

Question: Is it a legal for a company that is shipping their goods to make revenue from the shipping charges that they pass along to their customers? For example, I pay a carrier a dollar to haul something but I in turn charge the customer $1.10.

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With regard to increased liability resulting from this practice, no - I don't see how the shipper could assume any liability as a carrier or 3PL.

125) FREIGHT CHARGES – OFF BILL DISCOUNTS

Question: I have been billed by a supplier $498.61 in freight charges on a shipment received. Their bill from the freight carrier was $158.93, which includes their discount. We had questioned the amount of $498.61 as being high and the freight carrier sent us a copy of the bill and after seeing that, we only paid the $158.93.

Can the supplier enforce the $498.61 bill to us? We have only paid them the $158.93. The supplier is telling me it's perfectly legal to bill us the $498.61 and expect the full payment. They also said it was illegal for the freight carrier to fax us a copy of the bill showing their discount.

Answer: The question is how did your vendor represent the freight charges on its invoice to you?

I would note that some vendors use terms such as “shipping and handling” or have disclaimers to the effect that the charges shown on their invoices do not reflect the carrier’s actual charges because of volume discounts or rebates. However, if there has been no such disclosure, and if the vendor represented that the charges reflected its actual transportation charges, I would say that this is a misrepresentation and possibly even a commercial fraud. At the very least, it is a dishonest business practice.

126) FREIGHT CHARGES - OFF-BILL DISCOUNTING

Question: I know this question has been addressed previously, but I want to get a current and up to date opinion. Years ago we added the verbiage “Shipping and Handling Charge” as the line item title on our invoices for freight. We did this to avoid any potential exposure or claims based on an answer in Q&A volume 1 regarding freight charges and off bill discounting. Our freight accrual process populates our charges and is a direct pass through of the freight, pro-rated by weight, to the invoice. We have a customer who wants us to change the verbiage to simply “Freight”. Knowing that on occasion and number of human errors can alter the freight charges in our accrual system from actual, we are wanting to be sure by changing the terms, we do not open ourselves to a potential claim by any customer. Common errors might be incorrect SCAC or equipment types causing rating errors. They are rare, but do happen once in a while. What is the current prevailing opinion on this matter?

Answer: The issue to which you refer involves charging customers more than the actual freight and mis-representing that it is the actual freight charge. We have in the past suggested that this could be considered a form of commercial fraud.

From your description of the process for billing freight to your customers, it would appear that there is no intentional mis-representation of the actual freight charges, only a possibility of occasional inadvertent “human error”.

I would think that you should be able to comply with this customer’s request.

127) FREIGHT CHARGES – OFFSETTING CLAIMS

Question: Prior to the passage of the Interstate Commerce Commission Termination Act (ICCTA) the law prohibited offsetting payment of transportation charges. Did ICCTA alter this law in any way or can shippers now offset claims against freight charges?

Answer: Shippers can, and often do, offset unpaid loss or damages claims against the carrier's freight charges.

The former provisions against discrimination were part of the old "Elkins Act", 49 U.S.C. § 11902, et seq. and were eliminated by the ICC Termination Act of 1995. The only remaining provisions in the current law relate to rebates or offsets in noncontiguous domestic trade (AK, HI, etc.) and household goods, and are found in 49 U.S.C. § 14902.

However, before offsetting claims, a shipper should check the carrier's tariff rules for penalties, such as a loss-of-discount, for failure to pay freight charges within a specific time. Some carriers prohibit offsetting in their rules tariff. Shippers can negotiate to waive these rules, and contract shippers can insert appropriate provisions in their contracts.

This subject is covered in greater depth in "Freight Claims in Plain English" (3rd Ed. 1995) at section 12.3.6, Counterclaims and Setoffs.

128) FREIGHT CHARGES – OFFSETTING CLAIMS BY BANKRUPT BROKER

Question: In November 2001 we placed several shipments with Enron Freight Markets. Enron filed chapter 11 bankruptcy shortly thereafter and, because another Enron company owed us money - we did not pay these invoices. Enron's attorneys contacted us and we have had several letters go back and forth. We claimed a right of offset, to which they said "no" since the cases were not consolidated. We asked for proofs of delivery and proof of payment to the sub-contracted rail and motor carriers since we believe that there could be claims against us for any unpaid freight charges, and I'm sure there are many.

Enron's attorneys are telling us that since more than 18 months has elapsed without claims or civil suit that we cannot be held liable to any unpaid carriers.

Does the 18 month statute of limitations as per 49 USC section 14705 apply to my invoices from Enron Freight Markets? Can I simply tell them that the statute has expired? Does the bankruptcy filing change the situation?

Answer: The 18-month statute of limitations in 49 USC 14705 would govern an action by a motor carrier to collect its freight charges.

This would not necessarily apply to a claim against your company by Enron if it was acting as a broker. I would think that a broker's claim against its shipper arises out of a separate contract and would be subject to the usual state-law contract statute of limitations. In addition, claims that were not time-barred as of the date of filing of the petition in bankruptcy are usually subject to a 2-year extension of time in which the debtor in possession or trustee may bring suit.

129) FREIGHT CHARGES - ORIGINALS OR COPIES OF DOCUMENTS REQUIRED

Question: My company factors receivables for carriers. We also handle all billing and collections. When our carriers do not submit original Bill of Ladings ("B/Ls") to us for billing, we mail copies that were faxed to us immediately after delivery. Sometimes when we do mail original paperwork, the broker or consignee will say they never received it and we have to fax it to them. They then say since they did not receive the original paperwork, they cannot get paid by their customer and are withholding payment owed to us until they get paid. I believe this is a stall tactic, because shippers require faxed B/Ls upon delivery, so everyone always has a

backup copy. My question is, is there a law that I may cite to brokers and consignees who say that they require originals for payment?

Answer: No, there is no "law" that says whether an original or a copy has to be provided as a condition of payment of freight charges.

However, there can be a question as to the authenticity of documents, especially in this electronic age. Some companies use a stamp or attach a notice that certifies that the document is a true copy of the original, which is signed and dated by the sender. You might try this if there are questions about the documents.

130) FREIGHT CHARGES - OVERCHARGE CLAIMS

Question: Two similar questions regarding the handling of overcharge claims with a carrier. The first, from a freight payment center, involves inadvertent payments to carrier A on invoices belonging to carrier B. When overcharge claims are submitted to Carrier A for these payments it refused to refund the money on the basis that there are open invoices for that shipper. Can they do this?

The second question involves the post audit of freight bills with the same carrier. If an overcharge claim is filed on a freight bill for a shipment that was the subject of a description change made as a result of an inspection of the freight, the claim is returned to us with a letter from the carrier's Overcharge Claim Department stating "The [Carrier] Overcharge Claim Department is unable to process this claim because we no longer handle disputes concerning invoices that have been corrected by the Content Inspection Program. You will need to contact your local Service Center Manager or your Account Representative for further questions about correcting this claim. We apologize for any inconvenience."

Quite frankly, this creates a large burden on the claimant to jump through their hoops and to try to track down numerous account representatives, let alone the tracking of these claims, etc. We are of the opinion that it is an overcharge and the rules in the NMFC for the handling of overcharges do not require the claimant to segregate claims by type and to send them to different persons at a carrier. Isn't it the carrier's obligation to route these claims internally on their own if they decide to handle matters in this way?

Are there any legal opinions/options that we can refer them to in order to get the carrier to handle these without us having to identify hundreds if not thousands of account representatives? We do postaudits for in excess of a thousand companies I would guess and of course most of them use this carrier. This is a potential nightmare for us to do this work for them.

Answer: Although it is not totally clear whether you would prevail in either of these situations, I would suggest that you refer the carrier to the relevant federal regulations governing overcharge claims, 49 CFR Part 378, available online at

http://www.access.gpo.gov/nara/cfr/waisidx_02/49cfr378_02.html.

131) FREIGHT CHARGES - OVERWEIGHT LOAD HELD HOSTAGE

Question: We are a broker and we hired a trucker to pick up a load for a customer of ours. When the trucker went over scales he was overweight. The customer agreed to pay the fine/ticket, however, the trucker took the freight back to his location and will not deliver the freight or answer our phone calls. Our customer needs this freight today. We have sent the trucker written confirmation that we will pay the ticket/fine. What can we do?

Answer: You have not indicated the trucker's reasons for refusing to deliver the shipment. If he is demanding payment for the overweight fine and/or the agreed freight charges, you should

be aware that a carrier does have a “carrier's lien” for freight charges and does have the right to demand payment before releasing the freight.

In any event, if you can’t reach the trucker by phone, I would suggest that you deliver a WRITTEN notice (by fax, email or express courier) to him stating that:

(1) the shipper has agreed to pay the overweight fine,

(2) that you are making a demand for immediate delivery of the shipment,

(3) if he is asserting a carrier’s lien, you agree to tender payment for the overweight fine and the freight charges,

(4) that if he refuses to deliver the shipment upon payment of the fine and freight charges, he may be guilty of conversion, and liable for any consequential damages resulting therefrom, and

(5) that he will be held responsible for any loss, damage or delay to the shipment while it is in his possession.

132) FREIGHT CHARGES - PALLET EXCHANGE

Question: A shipper requires “Pallet Exchange”. The problem is the shipper will not allow us to exchange pallets at time of pickup at the originating warehouse. The shipper requests pallets be shipped to a separate company 10 miles away. The shipper then bills us for each pallet loaded onto our trailers at time of pickup but still doesn’t allow pallet exchange at the pickup location. Can a shipper bill us for pallets they refuse to take at the originating place of pickup? I know we are obligated to pallet exchange but are we obligated to deliver pallets to another company? Is the shipper required to accept pallet exchange at time of pickup, at the warehouse of origination, before they can bill us for said pallets not exchanged?

Answer: “Pallet Exchange” is not normally a legal obligation of a motor carrier unless there is some contractual agreement to provide that service. Such an obligation could be governed (through the bill of lading) by the carrier’s tariff, or by a provision in a written transportation contract.

I can’t tell from your description of the facts whether the parties agreed to any particular procedures, or what they were.

This is one of the reasons why we always recommend that our clients have properly drafted transportation agreements that clearly set forth the duties and obligations of the parties.

133) FREIGHT CHARGES – PALLETS

Question: When shipping LTL are we required to include the weight of the pallet on our Bill of Lading. Our products are Plastic Articles NOI NMFC 156600 (Freight Class range between 100-250). We feel like using the pallets is a convenience to the Carriers so why pay additional revenue to them? In addition we are absorbing the cost of the pallets as the shipper. If we are legally required to include the weight, should we have a clause in our contracts stating that pallet weight won't be added to the BOL?

Answer: If you are shipping under a Uniform Straight Bill of Lading and the carrier is a participant in the NMFC, there will be language that incorporates the various rules in the Classification. Item 995 of the NMFC provides that charges are to be computed on the actual gross weights including "a shipping carrier, container or package, or pallet, platform or skid..."

You can, of course, enter into a written transportation agreement with the carrier that supersedes the provisions of the bill of lading and/or the classification and tariffs. We often include a contract provision to the effect that pallet weights are not to be included in the chargeable weight.

134) FREIGHT CHARGES – PAYMENT PROBLEMS

Question: I took on a customer about 6 months ago. I moved 10 loads for him. On the 9th load, his check to me bounced. The amounts are always for $800.00. Before the check bounced, I moved his final load. I billed him on May 17th for the goods. I paid the carrier who hauled it. My customer is not paying the invoice. He ducks my calls and refuses to call me back. I have left messages for him on his cell #, office number and even home #.

He signed a credit application where he was to abide by my terms of 15-days.

I want to know what my recourse is. Can I go to the shipper to demand payment? The shipper is a large retailer and my customer is a liquidator. He is still doing business with shipper and he is still bringing the goods in via someone else.

What can I do? I have been chasing him for about 4 weeks now. The payment was due June 1st. I have no leverage since I am no longer hauling the goods.

Answer: I will assume that you are a registered broker and that the bill of lading for the subject shipment was marked "freight collect".

As a general rule, a shipper remains liable for freight charges even though the bill of lading is "freight collect" unless the shipper executes "Section 7" (the so-called non-recourse provision on the face of the Uniform Straight Bill of Lading). Thus, unless Section 7 was signed by the shipper, you may be able to re-bill the shipper and collect your freight charges.

If this approach should fail, then your recourse is probably limited to a lawsuit against the consignee (your customer). You may be able to do this yourself in small claims court, or you may have to retain an attorney.

135) FREIGHT CHARGES – PAYMENT TO FACTOR

Question: A broker that factors its receivables to a bank booked a load for a shipper (cost $3,900) and has now ceased operations. The bank is now seeking payment for the load from the shipper. The carrier that took the load from the broker finances its receivables with a different bank, and that bank is also seeking payment for the same load in the amount of $3,200. The broker's commission is about $700.00 but the broker's bank is seeking payment for the entire shipment. At this point the carrier has not been paid, and the 2 factors have not been paid. The shipper does not know whom to pay. What should the shipper do and are there any rules that address this issue?

Answer: First, the shipper only has a contractual relationship with the broker, not the carrier. Thus, if the shipper were to pay the carrier, it would still be subject to a claim from the broker or its assignee (factor/bank).

I would suggest that the shipper write to both of the claimants and ask them to come to some agreement as to which one should be paid. And, before paying anyone, the shipper should demand a release and indemnity agreement.

136) FREIGHT CHARGES – PROPER CLASSIFICATION

Question: We are trying to classify an item. The product is an aluminum angle as shown on a blueprint and it has a density of about 4 to 6 pounds per cubic foot. It is used in several different applications. Our weighing and inspection people are trying to classify this item based on density and I maintain that since the aluminum angle classification is not based upon density and the article is clearly an angle, that classification should apply. I submit that if carriers wanted to qualify angles on density they would have done so in the Classification, therefore the description should determine the classification. What is your opinion?

Answer: For technical questions involving application and interpretation of the National Motor Freight Classification we generally recommend that you contact one of the senior classification specialists for the NMFC at the National Motor Freight Traffic Association in Alexandria, Virginia for an opinion:

George M. Beck (703) 838-1813
Daniel E. Horning (703) 838-1820
William F. Mascaro (703) 838-1834
A full staff listing for contact is available at http://www.nmfta.org/staff2.htm.

137) FREIGHT CHARGES – RE-CLASSIFICATION OF FREIGHT

Question: I have a question regarding carrier invoices.

If a carrier justifiably re-classes a shipment can they go back on shipments that have already moved with the same product-and they didn't re-class it at time of shipment-can they go back and re-class those invoices and re-bill the customer?

Our situation in a nutshell:

The carrier moved our product under National Motor Freight Classification ("NMFC") #73360 class 70 in the past. Density of shipment is 9.4 pounds per cubic foot.

They have re-classed our shipment under NMFC #29205 sub 1 and referenced Rule/Item #680 as justification.

We have looked at the product and packaging and indeed the product only takes up about 50% of the packaging.

Our question is, "can the carrier now go back on old invoices and re-work these invoices under class 300?"

Also, it seems to me that the carrier has chosen an NMFC #29205 that favors them considerably. I have looked at boxes in the NMFC and not sure I understand the verbiage…they use words like united inches.

Do you have a NMFC # that would be a better fit than the one they have chosen?

The product is called Zip Fizz….it comes in a tube, it's a fruit dietary supplement drink. There are 20 to a box. The box is the final retail box.

Answer: I am not aware of any specific regulations that govern re-classification of freight or correction of information shown on a bill of lading under the circumstances you have described. It is likely that individual carriers may have internal procedures covering this matter.

In any event, carriers have always had the right to inspect and/or weigh freight in order to determine the correct rates that apply. This is reflected in Item 360, Sec. 3 of the NMFC, which provides:

> Sec. 3. Inspection of Property. When carrier's agent believes it necessary that the contents of packages be inspected, he shall make or cause such inspection to be made, or require other sufficient evidence to determine the actual character of the property. When found to be incorrectly described, freight charges must be collected according to proper description.

I would note that if you feel there is a bona fide dispute over the density of your shipments, you should contact the National Motor Freight Traffic Association and discuss the matter with one of the senior classification specialists for the NMFC at the National Motor Freight Traffic Association in Alexandria, Virginia for an opinion:

George M. Beck (703) 838-1813
Daniel E. Horning (703) 838-1820
William F. Mascaro (703) 838-1834
You can also try their website: http://www.nmfta.org/.

I would also note that the “180 day rule" (49 U.S.C. § 13710) would apply to any additional charges over those originally billed. This rule 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.”

138) FREIGHT CHARGES – RECOVERING OVERCHARGES FROM MISCLASSIFICATION

Question: A post audit has discovered that a LTL carrier improperly classified a product resulting in a potential overcharge around $200,000. The contract with the carrier indicated that the shipper reserved the right to file overcharge claims within a two-year period. At the time the contract was to be executed, both shipper and carrier agreed to reduce the time to 6 months.

This agreement was endorsed by the previous manager, leaving me with little chance to recover the $200,000. Specifically, an item was charged and paid as class 400 when it should have been class 125.

Is there any possibility of recovery? If so, can you cite any examples I may use in my defense?

Answer: Without reviewing the contract, I would have to assume that you have correctly interpreted the relevant language, that the agreement was in effect at the time of the shipments in question, and that it is binding on the parties.

I would note that if the contract does not specifically address the time limit for filing an overcharge claim and/or does not specifically waive provisions of Title 49, Subtitle IV, Part B, as provided in 49 U.S.C. §14101(B), the 180 day time limit in section 13710 would apply along with the 18 month statute of limitations in section 14705(a).

Section 13710 provides:

> (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.

This being said, while the carrier may have a complete defense to these overcharges, there is no longer any prohibition against the carrier acknowledging the claim and agreeing to make some payment if it so chooses. It never hurts to inquire.

Assuming there is an ongoing business relationship, it is not unheard of for parties to come to some sort of agreement for compensation in situations like this and creativity may help the process. Rather than seeking an outright reimbursement of the overcharge, perhaps an increased discount and/or waiver of accessorial charges until the balance is covered could be agreed upon.

139) FREIGHT CHARGES – REFUSED COD SHIPMENT

Question: We shipped an order freight collect and executed section 7 of the bill of lading. Before the carrier attempted to make delivery, they found they (the carrier) had the consignee on credit hold and insisted on payment of freight charges before delivery. The consignee refused. Now the carrier wants us to take back the product. The client has not paid for the merchandise, as they have not yet taken delivery. Our terms are FOB origin. If we direct the carrier to return the goods to us, will we be responsible for the initial freight charges which the carrier was to collect from the consignee as well as charges for returning the goods to us?

Answer: Ordinarily, if the shipper executes “Section 7” of the Uniform Straight Bill of Lading (the so-called “non-recourse” provision), the carrier can only look to the consignee for the payment of its charges.

However, in this case the shipment was refused, and the carrier has a lien on the goods in its possession for its freight charges, and possibly its storage charges. Thus, as a practical matter, if you want the shipment returned, you will have to pay the carrier for both the outbound and the return freight.

I would note that you do have a cause of action against the purchaser, who wrongfully refused the shipment.

140) FREIGHT CHARGES - RETURN OF DAMAGED SHIPMENT

Question: If the shipper requests for a shipment that was delivered partially damaged to the consignee be brought back for repairs, who is responsible for the charges incurred with the carrier? Is it the responsibility of the carrier to move the shipment back "free astray" for repairs by the shipper, and back to the consignee, or can they legally charge for the transportation move twice?

Answer: There are no laws or regulations that specifically apply to the situation you describe.

Some carriers will bring back goods that are misplaced or damaged in transit to the shipper without charge ("free astray").

As a general rule, if the shipper specifically requests the carrier to pick up and return damaged goods, it would be customary to bill the shipper for the return freight charges. Likewise, if the goods are refurbished or repaired, and the shipper then requests the carrier to re-deliver the goods to its customer, the shipper would be usually be responsible for the freight charges.

This does not mean that the carrier is charging "for the transportation move twice" because they are separate movements, on separate bills of lading.

However, you should be able to recover these additional freight charges (assuming that they are reasonable expenses incurred in mitigating the loss). In other words, the claim would probably have been for the full invoice value of the goods if it had not been possible to bring them back for repair or refurbishment, so the expenses were legitimately incurred in order to reduce the loss.

141) FREIGHT CHARGES - ROUTING GUIDE COMPLIANCE

Question: The company I am working for has a clear supplier guide which states: “For any routing violation, a charge back for full amount of freight to the vendor will be applied on material invoice.”

Note that all our vendors have to ship us collect using the carrier of our choice. The vendor can determine the carrier to use in a chart contained in the shipping and routing instructions. I am wondering if this practice is unreasonable and unfair according to law? Note that the company is in both Canada and the United States. From my point of view, our vendor should be charged back only for the differential between what it has cost with the wrong carrier and what it would have cost using the carrier of our choice. In addition to that, it would be normal to add an administration fee.

Thanks for answering my question because I am worried about my company practice and I have twinges of conscience.

Answer: Whether or not your "routing guide" provisions would be enforceable depends on if they are part of your contract with the vendor, i.e., incorporated into your purchase order and/or vendor acceptance.

It does seem somewhat unreasonable to charge back the full amount of the freight charge if the vendor does not use one of your designated carriers. Your suggestion to charge back the difference in the freight charges, and possibly a service charge, would be less likely to create a problem with your vendors.

142) FREIGHT CHARGES – SECTION 7

Question: Just read TRANSDIGEST #95 last night and found an area of concern.

On page 13 "Freight Charges - Who Pays Accessorial Charges" you refer to signing Section 7 of the bill of lading on prepaid shipments in order for shipper to avoid paying unwanted accessorial charges incurred by customers. The way I understand it is that Section 7 is designed only for "Collect" shipments and not prepaid shipments, therefore the shipper will be responsible for the accessorial charges even if section 7 is signed. It is stated on the bill of lading "for freight collect shipments". What a shipper should do is put that prepaid language in their contract with the carrier and shipper will be protected against paying accessorial charges. The only problem is that the carrier may not accept that language in their contract.

I'm not a lawyer so please clarify.

Answer: The language "For Freight Collect Shipments" was first added to the non-recourse section or "Section 7" of the Uniform Straight Bill of Lading effective December 27, 1997 (as a result of the Trucking Industry Regulatory Reform Act of 1994 and the ICC Termination Act of 1995, which essentially eliminated all tariff filing requirements), and was not there before that date.

The older court decisions dealing with Section 7 involve both prepaid and collect situations, and say that signing Section 7 on a prepaid bill of lading would insulate the shipper from any additional charges such as detention, re-delivery, etc. To the best of my knowledge there have been no decisions on this question since the new language was inserted in the 1997 version of the Uniform Straight Bill of Lading.

Naturally, if the shipper has a properly-drafted transportation agreement, or prepares its own bills of lading, this ambiguity can be corrected by including appropriate non-recourse language.

143) FREIGHT CHARGES – SECTION 7 "NON-RECOURSE" PROVISION

Question: Can you provide me the details pertaining to the Section 7 law?

I would like to bill the shipper or the consignee for a freight bill that is not being paid by the third party who was originally billed.

Answer: "Section 7" refers to a provision that is set forth in the Uniform Straight Bill of Lading and is a contractual term. The face of the current Uniform Straight Bill of Lading as set forth in the National Motor Freight Classification ("NMFC"), and which became effective December 27, 1997, contains a box that states:

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

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

> Sec. 7. (a) The consignor or consignee shall be liable for the freight and other lawful charges accruing on the shipment, as billed or corrected, except that collect shipments may move without recourse to the consignor when the consignor so stipulates by signature or endorsement in the space provided on the face of the bill of lading. Nevertheless, the consignor shall remain liable for transportation charges where there has been an erroneous determination of the freight charges assessed, based upon incomplete or incorrect information provided by the consignor.
>
> (b) Notwithstanding the provisions of subsection (a) above, the consignee's liability for payment of additional charges that may be found to be due after delivery shall be as specified by 49 U.S.C. § 13706, except that the consignee need not provide the specified written notice to the delivering carrier if the consignee is a for-hire carrier.
>
> (c) Nothing in this bill of lading shall limit the right of the carrier to require the prepayment or guarantee of the charges at the time of shipment or prior to delivery. If the description of articles or other information on this bill of lading is found to be incorrect or incomplete, the freight charges must be paid based upon the articles actually shipped.

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

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

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

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

144) Freight Charges – Section 7 vs. FedEx Airbill

Question: We are a wholesaler of variety merchandise to dollar stores. A customer arranged for FedEx to pick up a shipment at our warehouse that was to be delivered “next day air.” FedEx picked up and signed for the shipment on my company’s straight bill of lading, which had Section 7 signed, and charges noted as collect. The FedEx agent then prepared the airbill, noting the recipient’s FedEx account as the billable party. The customer has disappeared, and FedEx has reversed the charges to us, the shipper. Of course, the airbill states that by “using this Airbill” we are bound by FedEx terms and conditions, which include reversal of charges to shipper if recipient fails to pay. The bill is $13,000.00. Because this was an air shipment, is our bill of lading worthless, and are we bound by the terms of the airbill even though we did not arrange pick-up of the shipment and did not prepare the airbill? Due to a bill dispute from ten years ago, we do not directly contract with FedEx for shipments, and they generally will not pick up from us unless directed by a third party, or if the charges are paid in advance.

Answer: This was an air shipment and FedEx would probably say that you should have known that FedEx would issue its usual air waybill, which always incorporates the terms and conditions of its Service Guide and tariffs. Unfortunately, FedEx seems to prevail in court most of the time when it comes to the enforceability of its air waybill and/or Service Guide.

I agree that the fact there were two bills of lading appears to create an ambiguity as to whether the “Section 7” non-recourse language should prevail, which would normally be

construed against the carrier. Also, cases, such as *Commercial Metals*, state that a shipper could have protected itself by signing section 7. Therefore, you could claim that you were operating under a reasonable expectation that FedEx could only collect from the consignee.

This is a tough situation, and short of litigation, I would suggest that you take your position to a higher level at FedEx and see if it can be resolved.

145) FREIGHT CHARGES – SECTION 7

Question: Our company was the shipper, the Bill of Lading had the consignee responsible for freight. The consignee went belly up and won't pay, and now the carrier is coming back to our company. Can they do this and on what basis?

Answer: As a general rule, a shipper remains liable for the payment of freight charges even if the bill of lading is marked "freight collect". The only exception is what is called the "Non-Recourse" or "Section 7" provision that is found on the Uniform Straight Bill of Lading. If the shipper signs the "Section 7" box on the face of the bill of lading, the carrier can only look to the consignee for payment of its charges.

146) FREIGHT CHARGES – SET OFFS FOR DAMAGES

Question: We are a trailer load over-the-road carrier that occasionally has to rely on a broker to move a truck out of an area. Recently, we have been receiving payments from one particular broker that will deduct a claim amount from our payment without ever filing a claim. Several times we have investigated the matter and found we were not at fault, so we confronted them, only to be told that their customer deducted it from their payment, so they did it to us. Can they legally deduct from the payment without filing a claim?

Answer: It is no longer "illegal" for a shipper or a broker to deduct or set off loss and damage claims against freight charges, due to the changes made by the passage of the Interstate Commerce Commission Termination Act, effective January, 1996.

They should, of course, file a claim in writing.

Unfortunately your legal recourse is to bring a suit for your freight charges. They may counterclaim for the loss or damage, but if they failed to file a written claim within the time limits specified in your bill of lading or tariff (usually 9 months), the counterclaim could be time-barred.

147) FREIGHT CHARGES - SETOFF OF CLAIMS

Question: We are a local harbor trucking company that delivers sealed ocean containers. Upon delivery to this particular client because of the way their dock is situated, the container doors must be open as the driver backs into their unloading dock which is on a very steep angle. The back of the container does have a type of fish netting to keep cartons from tumbling to the ground. In this particular instance this netting did not work and cartons fell to the ground & the customer is claiming damage. They said the driver made the truck "jerk" which caused the cartons to fall. We denied liability for the damage on the basis of the position of their dock and that they should have provided load locks to be placed at the door of the container to keep the cartons intact.

The import broker who was to be responsible for paying our trucking charge has debited the claim amount from our trucking invoices. My question is twofold. (1) Can they withhold trucking charges to pay for a freight claim even though we have denied liability. (2) Our delivery invoices also contain a "release valuation" clause which states that unless they declare a greater value,

our liability for the merchandise is to be not exceeding $.50 per pound and our liability including negligence is limited to the sum of $50.00 per shipment.

How would we stand on this issue if we take the client to small claims court for withholding payment of freight charges?

Answer: There are a number of issues raised by your questions:

1. It is not "illegal" for a shipper (or its representative such as an "import 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.

2. The next question involves both carrier liability and limitations of liability:

a. The law places a high standard on common carriers, and a carrier will usually be found liable unless it can prove that the loss or damage was caused by and excepted cause such as "the act of default of the shipper" AND that it was free from any negligence that may have caused or contributed to the loss or damage. From your description of the facts, I think you might have difficulty in proving freedom from any negligence.

b. Limitations of liability are generally enforceable IF the carrier has complied with certain minimum requirements. The court decisions usually focus on: (1) whether the carrier has issued a bill of lading that clearly states that there is a liability limitation or otherwise incorporates by reference limitations that are contained in an applicable tariff; (2) whether there is reasonable opportunity to choose between two or more levels of liability, and (3) whether there is a choice of rates for the different levels of liability. It is not clear whether the "release valuation" clause in your delivery invoices would meet these requirements.

148) FREIGHT CHARGES – SHIPPER FAILS TO PAY BROKER

Question: We have several freight invoices which we have not been able to collect from one of our customers.

We are a Canadian freight broker and our customer tendered four (4) shipments in May and June 2005 from their plant in Canada to various U.S customers on their “Combination Short Form Straight Bill of Lading – Express shipping contract”, on a Prepaid basis. The shipper has since ceased operations and has not paid the freight invoices. Their account was referred to a collection agency, but they were unable to collect the monies owed.

The shipper has not filed for protection from the creditors, nor has the company filed for bankruptcy. The personnel still working at the plant confirm that they are experiencing serious cash flow problems and many suppliers have not been paid. They confirmed that they are wholly owned by a U.S. company in New Jersey. Do we have any recourse against the U.S. parent company? If not, can we re-invoice theses amounts to the consignee?

Answer: I would assume that Canadian shipper is a separate corporate entity so it is unlikely that the parent company in New Jersey would have legal liability for its debts. This does not mean that you can’t re-bill the charges to the U.S. parent company, explain the situation, and see whether they will pay your bills.

As for billing the consignee, this can also be done. However, you should be aware that the consignee on a prepaid shipment, if it has paid the shipper’s invoice for the goods (which includes the delivery charges), would have a legal defense. Under what we refer to as the “estoppel cases”, the consignee would not generally be liable since it would constitute a double payment of the freight charges.

149) FREIGHT CHARGES – SHIPPER GOES BANKRUPT

Question: About 9 months ago my company purchased products from a supplier who had the goods drop-shipped directly from the manufacturer (their supplier). The goods were shipped 3rd party collect (billed to my supplier) and the shipper executed section 7 of the contract bill of lading. My supplier, who was initially billed and liable for the freight charges, declared bankruptcy shortly thereafter and did not pay the broker (a logistics company) for the freight charges. Now the logistics company has filed suit against my company for the freight charges, including attorney's fees and interest accrued from the original date of the shipment. Is my company liable to the logistics company for any of the aforementioned charges?

Answer: A consignee may be liable for freight charges on the theory that it has received the benefit of the transportation services.

However, you should be aware of a line of court decisions in which the principle of "estoppel" has been applied. Where goods are shipped on a "prepaid" bill of lading, and the consignee-purchaser has paid the shipper-seller for the goods (including the transportation charges), this principle protects the consignee against "double payment" liability for the freight charges.

Although your fact pattern is a little different, from what you have told me, I would think you would be entitled to assert the estoppel defense and should not be liable to the "logistics company" or the carrier.

150) FREIGHT CHARGES – SHIPPER'S LIABILITY

Question: I have a motor carrier company. A broker had me move a load of 9 pallets. Now, the broker refused to pay me asserting that he has not been paid yet.

The bill of lading for the shipment that we delivered on has a Section 7 box. It has been checked "C.O.D. charge to be paid by the Consignee", but the consignor did not sign in Section 7.

As the consignee is not paying the broker for the freight charges I do not think they would pay me either. Can I bill the consignor for the freight charges?

Answer: As a general rule a shipper remains liable for payment of freight charges (unless "Section 7" - the so-called "non-recourse" provision of the Uniform Straight Bill of Lading is executed). This would be true whether the shipment is "freight prepaid" or "freight collect", *see Southern Pacific Transportation Co. v. Commercial Metals*, 456 U.S. 336, 102 S.Ct. 1815 (1982).

An instruction to collect "C.O.D" charges has nothing to do with freight charges. This is an instruction to the carrier to collect the price of the goods (the invoice price) upon delivery.

151) FREIGHT CHARGES – SHIPPER'S LIABILITY

Question: We sold product to a customer who arranged the freight for pick up and delivery. The customer was paying the freight charges. The customer has gone out of business and never paid the freight company. The freight company is now coming to us saying we are responsible for all the charges. We did ship the material on a packing list instead of a bill of lading. Are we responsible for the freight charges although we had nothing to do in handling it?

Answer: Ordinarily, in the absence of some other agreement, a shipper remains liable for freight charges, even if the bill of lading is marked "collect", see *Southern Pacific Transportation Co. v. Commercial Metals*, 456 U.S. 336, 102 S.Ct. 1815 (1982).

If you are using a Uniform Straight Bill of Lading, there is a way the shipper may be able to protect itself against additional charges. The bill of lading has a box referred to as "Section 7" which, if signed by the shipper, requires the carrier to look to the consignee for payment.

If some other document such as a “packing list” was used that did not have a “Section 7” box, I think that the only way a shipper could protect itself would be with some explicit language either written on the face of the packing list or in some separate contractual document.

I would note that the federal statute of limitations (49 U.S.C. 14705) for a carrier to collect its freight charges is 18 months from the date of delivery. Thus, the carrier could be time-barred if more than 18 months has elapsed.

152) FREIGHT CHARGES – SHIPPER'S LIABILITY

Question: Our company was the shipper, the Bill of Lading had the consignee responsible for freight. The consignee went belly up and won’t pay, and now the carrier is coming back to our company. Can they do this and on what basis?

Answer: As a general rule, a shipper remains liable for the payment of freight charges even if the bill of lading is marked “freight collect”. The only exception is what is called the “Non-Recourse” or “Section 7” provision that is found on the Uniform Straight Bill of Lading. If the shipper signs the “Section 7” box on the face of the bill of lading, the carrier can only look to the consignee for payment of its charges.

153) FREIGHT CHARGES – STATUTE OF LIMITATIONS ON DUPLICATE PAYMENTS

Question: We are a third party auditing company and have filed several duplicate payment and “wrongful payment” (wrong carrier) claims that have been declined by a particular carrier based upon an 18 month statute of limitations.

My understanding has been that these types of claims fall under the jurisdiction of local statutes and that normally the statute of limitations is at least 5 years.

Which is true?

Answer: The 18-month statute of limitations would apply to “overcharges” (49 USC 14705). A duplicate payment is not considered an overcharge, and would therefore be subject to the state law statute of limitations.

154) FREIGHT CHARGES – STATUTE OF LIMITATIONS ON DUPLICATE RAIL PAYMENT

Question: An overcharge claim has been filed against one of the railroads for charges that were paid in error to two different railroads. The railroad is declining the claim based upon the 3-year statute of limitations. They claim that the statute would not apply if it were simply a case of a duplicate payment, but does apply in this case because there was a duplicate billing.

Can they decline the claim just because they sent out a freight bill, even though they did not participate in the movement at all? The cars were moved on a direct route by the other railroad.

Answer: The relevant federal statute of limitation for actions against rail carriers is 49 U.S.C. 11705:

> Sec. 11705. Limitation on actions by and against rail carriers
>
> * * * *
>
> (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).
>
> (c) A person must file a complaint with the Board to recover damages under section 11704(b) of this title within 2 years after the claim accrues.

Although I am not aware of any case law with the fact pattern you have described, it would seem that either subsection (b) or (c) would apply. Subsection (c) refers to section 11704 (b) which provides:

> Sec. 11704. Rights and remedies of persons injured by rail carriers
>
> * * * *
>
> (b) A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part. A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable to a person for amounts charged that exceed the applicable rate for the transportation.

Even if your claim is not for "overcharges", it could be construed as being based on a violation of Title 49, Subtitle IV, Part A (Interstate Commerce Act). If so, your claim would fall under section 11704 (b) as "damages", in which case the time limit would be even shorter - 2 years.

Having said this, I would note that there is still a possible remedy under state law that would not be time-barred. We have taken the position in a duplicate payment case in New York that it was "an action based upon mistake" which, under New York's CPLR Section 213, would have a 6-year statute of limitations. However, this remedy and the 6-year statute may or may not be available in other states.

155) FREIGHT CHARGES - STATUTE OF LIMITATIONS

Question: On 3/2/03 a shipment was made to us, however, due to a classification error the carrier's invoice was for the wrong amount. Citing the National Motor Freight Classification ("NMFC"), we paid the invoice short. On 7/4/04 the carrier issued a balance due. We responded with the item from the NMFC. On 3/25/05 a collection agency contacted us seeking payment.

I know the 18-month rule - but does that mean the carrier must file in a court of law to recover or does giving the item to a collection agency constitute authorization to collect.

Can I decline the claim using the NMFC or the statute of limitations in 49 USC 14705? The claim is only $285.34.

Answer: 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 from the date of delivery, the carrier's claim is time-barred. It makes no difference whether the carrier or a collection agency is trying to collect the claim.

156) FREIGHT CHARGES – STATUTE OF LIMITATIONS

Question: We are a manufacturer and have gotten a request for payment from a transportation collection specialist, which is representing an out of business trucking company. This request is for a shipment that went collect to the customer. Unfortunately "Section 7" was not signed. The shipment date was June 2000. This customer has since then gone out of business. I have a couple of questions concerning this request for payment.

1) Isn't there a 18 month “Statue of Limitations” for collecting freight charges? We were never notified that this freight bill had not been paid, given this information can we still be held liable for the freight charge?

2) This company is asking for $1,506.80 in payment for this shipment, which was class 60 freight weighing 345 pounds. By my calculations this shipment would have cost $175.00, with no discount. Can they ask for so much by law? I am wondering what legal recourse do we have?

Answer: The statute of limitations for a motor carrier to collect freight charges is 18 months, measured from the date of delivery, see 49 U.S.C. 14705.

There is also a “180 day rule”, 49 U.S.C. 13710, that limits the time for a carrier to issue any bill for charges in addition to those originally billed (i.e., “undercharges”).

It sounds as though this invoice is time-barred by both of the sections referred to above.

157) FREIGHT CHARGES – STATUTE OF LIMITATIONS

Question: In 1998 I contested a number of freight bills from a common carrier that was charging me for unauthorized accessorial charges totaling about $5,400.00. These freight bills were paid short according to the agreement we shared at the time. Over time, I spent numerous hours speaking locally then corporately regarding the balance due bills. In early 1999 I was contacted by a collection agency representing the carrier regarding the balance. They were now demanding close to $7,300.00, claiming 30% late fees on top of the balance due bill. Again we explained our position of the contested balances. During this same time I reexamined the bills and concluded that we did in fact owe $980.00 of the balance. This said, we offered the collection agency representative and the carrier collection manager $1000.00 on the +$7K balance, and would await their response. None was ever received.

Now in 2003, I have received a summons to court to answer a complaint of “defendant owes plaintiff $7453.36 pursuant to a breach of a credit card agreement.” I really have several questions: Is there not a statute of limitations regarding the straight bill of lading and common carrier claim after such a long period of time? If so, can you tell me what that limitation is? Finally, I do not believe I have breached a credit card agreement, have I?

Answer: Assuming these shipments moved in interstate commerce, federal law would apply. 49 U.S.C. Section 14705 states that a motor carrier “must bring a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues...” The claim accrues “on delivery or tender of delivery by the carrier...”

From what you have indicated, these claims are time-barred by the statute of limitations.

As to the last part of your question, I would agree that this is not a credit card debt!

158) FREIGHT CHARGES – THIRD PARTY BILLING

Question: I have received a slew of “Past Due” bills from Federal Express all referencing airbills on which our company stated “third party billing” and supplied the appropriate billing accounts as supplied by our customers.

FedEx has informed me that on many of these the customer has either refused to pay the charges or that their account was on hold at the time of billing. Additionally I have been told that because the invoice dates are over 60 days, that we cannot have the charges billed to another account, or the original account with the account holders permission. This is per their “Terms and Conditions” and seems to be non-negotiable. The Logistics Manager within our company believes that we should have a longer period of time to “correct” these matters by means of

supplying the information to FedEx for proper billing. I have not been able to find anything that would help our case, what do you suggest?

Is there anything that you are aware of other direction I could go in to bring closure to these items for my company?

Answer: Parcel and express carriers such as FedEx publish a service guide or tariff that contains contractual terms and conditions. The problem is that their "airbill" or receipt most likely has language incorporating the terms and conditions of the Service Guide, i.e., the Service Guide becomes part of the "contract of carriage" and thus binding on the shipper.

Some of these provisions may be unenforceable if they violate an applicable federal statute or regulation. I am not aware of any court decisions dealing with this issue, but I would think that the billing provisions that you have discussed probably would be enforceable.

The carrier is legally obligated to provide a copy of the service guide or tariff. I would suggest that, before you pay these invoices, you demand a copy of the relevant service guide or tariff provisions to make sure that that the claim is substantiated.

159) FREIGHT CHARGES - THIRD PARTY BILLING

Question: I have a question about using this freight term. If we ship collect and the invoice is to be paid by the consignee's freight bill payment firm, does that make this shipment a "third party" pay? When do we need to put that freight term on the bill of lading?

I think we should only use it when a third legal entity pays the freight bill and not just a freight bill payment firm. We pay our freight invoices through a freight payment firm and do not put "prepaid, third party" on the bill of lading. I would appreciate your opinion.

Answer: I would not consider a freight payment company to be a "third party" payor, since it is acting as an agent for the shipper or the consignee. Usually this suggests that the "third party" has some beneficial ownership in the goods (seller, buyer, drop shipment, etc.).

If you are using a Uniform Straight Bill of Lading or some variation thereof, I would suggest that the box on the face of the bill of lading should be checked "collect", and that the "Section 7" box (the non-recourse provision) should be signed, so the carrier looks to the consignee for payment.

If the consignee requests that you indicate its freight payment company on the bill of lading, you could do so as an accommodation to your customer, but such instructions should be put in the description area of the bill of lading for information only.

160) FREIGHT CHARGES – TIME LIMITS TO PAY

Question: My company has done business with a customer for several years. They have had several different freight payment companies pay their bills over the years. While we never have had a written contract with them, freight has been tendered to us, and some of the freight bills have been paid, but some have not. The unpaid freight bills date back to 1997 and some are as recent as 2002. I have repeatedly sent, and re-sent all required copies of delivery receipts and shipping orders to the various freight payment companies, but for some reason they have yet to have been paid.

I finally contacted the Global Traffic Manager, via mail, with copies of all of the unpaid freight bills, asking for his assistance. His reply was that Title 49 allows Lear Corporation to not be required to pay these bills. What recourse do I have?

Answer: While the shipper COULD (voluntarily) pay these freight charges, it does not have a legal obligation to do so. The relevant statutory provision is the statute of limitations in 49 U.S.C. Section 14705(a) 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.

Thus, for unpaid freight charges, the carrier would have up to 18 months to bring a legal action to collect its unpaid bills.

161) FREIGHT CHARGES – TIME LIMITS

Question: My question is actually two parts,

1) What is the required time that freight invoices should be kept for auditing purposes?

2) Is there a time limit that a carrier has to address a short paid invoice?

Answer: The relevant statutory provisions applicable to motor carriers are found at 49 U.S.C. Sections 13710(a)(3)and 14705.

49 U.S.C. Section 13710(a)(3) provides:

(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.

Obviously, any audit of freight bills should be done promptly and claims for overcharges should be submitted within the 180 day time limit. Likewise, carriers must also comply with the same 180 day time limit for submitting their balance due bills for additional charges.

However, a “short paid” bill is a different situation, since the carrier is not seeking “additional charges” over those originally billed. There, the relevant law is the statute of limitations in 49 U.S.C. Section 14705(a) 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.

Thus, for unpaid freight charges (where no “additional” amounts are claimed), the carrier would have up to 18 months to bring a legal action to collect its unpaid bills.

162) FREIGHT CHARGES – TIME SPECIFIC DELIVERY

Question: We are a small freight brokerage (just me and my wife). We got a load, just 2 pallets of customer printed bags to deliver from Hillside, NJ to Las Vegas, NV. Our customer requested that we ship this as a guaranteed shipment. Pick up on the 20th and deliver by the 25th. We posted the load on a load board with all the details. A carrier called us that they wanted the shipment. We made it very clear to them that it must deliver before the 26th or we

won't pay for the freight charges. We also included this in the rate confirmation and agreement: "Shipment guaranteed to deliver by Monday the 25th". The carrier signed for it.

We called the carrier on the 25th and their dispatcher said it will deliver in the next hour. Our customer was also told the same thing when they called. The carrier even told our customer not to worry because you won't have to pay for the freight anyway because it is a guaranteed shipment. It was not delivered that day.

The carrier sent us a bill for the full amount. We faxed back to them that we would not pay it because our customer refuses to pay. They reported us to "Compunet" (now changed to First Advantage). However, when we presented the facts to "Compunet" they took our side and removed the claim from our file.

Now the carrier is suing us in small claims court. Who is right here?

Answer: Ordinarily a common carrier only has a duty to deliver with "reasonable dispatch" and would not be required to deliver within a specific "window" or by a time certain. However, where a carrier agrees in advance to deliver by a particular date or time, that becomes an enforceable contract. When "time is of the essence", a failure to make timely delivery is a material breach of the contract.

I assume that the consignee refused to accept the shipment because it was too late. If so, the carrier is not entitled to collect its charges.

163) FREIGHT CHARGES - TIME TO ISSUE INVOICES

Question: How long does a freight company have to issue an invoice from the time of shipment? We are receiving original freight invoices months after material is delivered to job sites. These jobs are completed and our customers are refusing to pay these invoices.

If we were to issue our purchase orders with a statement such as "All freight invoices must be issued within 30 days" would that help and would it be binding or legal?

Answer: The answer to your first question may be found in federal regulations of the FMCSA (formerly ICC) at 49 CFR Section 377.205 which states as follows:

> 377.205 Presentation of freight bills.
>
> (a) "To be prepaid" shipments.
>
> (1) On "to be prepaid" shipments, the carrier shall present its freight bill for all transportation charges within the time period prescribed in paragraph (a)(2) of this section, except-
>
> (i) As noted in paragraph (d) of this section, or
>
> (ii) As otherwise excepted in this part.
>
> (2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the carrier received the shipment. This time period does not include Saturdays, Sundays, or legal holidays.
>
> (b) "Collect" shipments.
>
> (1) On "collect" shipments, the carrier shall present its freight bill for all transportation charges within the time period prescribed in paragraph (b)(2) and of this section, except-
>
> (i) As noted in paragraph (d) of this section, or
>
> (ii) As otherwise excepted in this part.
>
> (2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the shipment was delivered at its destination. This time period does not include Saturdays, Sundays, or legal holidays.
>
> (c) Bills or accompanying written notices shall state penalties for late payment, credit time limits and service charge and/or collection expense charge and discount terms. When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bills presented at one time shall state that "failure timely to pay

freight charges may be subject to tariff penalties" (or a statement of similar import). The bills or other notice shall also state the time by which payment must be made and any applicable service charge and/or collection expense charge and discount terms.

(d) When the carrier lacks sufficient information to compute tariff charges. (1) When information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at its billing point, the carrier shall present its freight bill for payment within 7 days following the day upon which sufficient information becomes available at the billing point. This time period does not include Saturdays, Sundays, or legal holidays.

(2) A carrier shall not extend further credit to any shipper which fails to furnish sufficient information to allow the carrier to render a freight bill within a reasonable time after the shipment is tendered to the origin carrier.

(3) As used in this paragraph, the term "shipper" includes, but is not limited to, freight forwarders, and shippers' associations and shippers' agents.

As to your second question regarding "purchase orders", I assume you are referring to a transportation contract between the shipper and the carrier. If so, it would be appropriate to include language governing the submission of freight bills.

If you do not have written transportation agreements with the motor carriers that your company uses, I would advise you to consider this in order to minimize potential disputes.

164) FREIGHT CHARGES – TIME TO REVERSE CHARGES

Question: What is the statute of limitations for reversing freight charges to the shipper or consignee? Does the 18 month rule apply or the 180 day rule?

Answer: Before deciding what time period is applicable, it is necessary to determine if the freight charges can be "reversed," i.e., whether the shipment was "prepaid" or "collect", whether section 7 was signed, etc. In certain of these circumstances, a carrier may not have the right to "reverse" bill.

Nevertheless, if we assume that the carrier can "reverse" the charges, my initial reaction would be that the 180-day rule would NOT apply to the "reverse-bill," because the "reverse-bill" would likely be considered an "original" bill vis-a-vis the party receiving it.

165) FREIGHT CHARGES – UNPAID INVOICES TO DEFUNCT BROKER

Question: We are a shipper of poultry products. A truck broker we have dealt with for years has gone out of business without paying carriers who hauled some of our loads. We have six loads that we have not paid the broker for. The broker sold his accounts receivable to a bank. Both the bank and the unpaid carriers are asking us to pay them. Who should I pay?

Answer: This is, unfortunately, a common scenario. The problem is that your contract is with the broker and not with the bank or the carriers. If you pay anyone, you should first insist on getting a written release and indemnity agreement from all of the other parties.

166) FREIGHT CHARGES – VENDOR DEFAULTS ON PREPAID SHIPMENT

Question: I took John Harvey's claims class last year and we really didn't get into this topic, but we did business with a vendor several years ago that subsequently went out of business. (I think these shipments date back to 98/99). Anyways, this shipper filed Chapter 7 or 11 (not been able to get a clear answer on which) and the carrier came after us for payment. We can't

get a clear answer from the carrier as to whether they even made an attempt to collect from the shipper. They basically tell us since they did not get payment from the shipper it is our responsibility. Our argument was that we have essentially paid freight once in the cost of goods, however we cannot find any statute to support our position, nor has the carrier offered any to support their position. Do we owe any money on these claims?

Answer: A consignee may be liable for freight charges on the theory that it has received the benefit of the transportation services.

However, there is a 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.

NOTE however, that if the carrier is trying to collect freight charges on shipments from 98/99, that the statue of limitations is 18 months, 49 USC 14705, which has long since run.

167) FREIGHT CHARGES – WHO HAS TO PAY

Question: A Warehouse company ("WHC") storing and shipping products for various clients, closes or goes out of business. The WHC used common carriers as well as contract carriers with the WHC being the payor of the freight. The WHC customers had paid the WHC for freight charges as part of their normal invoices for processing shipments.

The carriers are now contacting or forcing collections on the customers of the WHC as well as threatening judgments.

Is there any legal basis for this as these customers were not privy to the agreement between the carriers and the WHC? The carriers had extended credit to the WHC, not the customers. Should these customers be responsible for these charges although they have already paid to the WHC?

Answer: Although there is case law that generally protects a shipper that deals with a broker (as an independent contractor) against "double payment", I think the situation you describe is distinguishable.

The relationship between the shipper and warehouseman is similar to the principal-agent relationship discussed in the shipper association cases such as *Southern Pac. Transp. Co. v. Continental Shippers*, 485 F.Supp. 1313 (W.D. Mo. 1980); *Metro Shippers, Inc. v. Life Savers, Inc.*, 509 F.Supp. 608 (D. NJ 1980); *Central States Trucking Co. v. J.R. Simplot Co.*, 965 F.2d 431 (7th Cir. 1992).

The warehouse would probably be considered the agent of the shipper (owner) of the goods, especially if the shipper is shown on the bill of lading, and instructs the warehouse as to its outbound shipping requirements.

168) FREIGHT CHARGES – WHO PAYS ACCESSORIAL CHARGES

Question: We have many less-than-truckload ("LTL") shipments that are arranged and shipped prepaid by our vendors. We then receive invoices from the LTL carriers for the accessorial charges (i.e. detention, sort & segregate and notification). When we notify the carrier that the shipment shipped prepaid and that we are not responsible for any portion of the freight charges, they claim that the shipper is only responsible for the freight charge (line haul charge) and the consignee is responsible for the accessorial. Is this correct?

Answer: The carrier may have a contract with the shipper that determines how destination accessorial charges will be billed, and I can understand how a shipper might balk at paying detention charges, etc. caused by its customer.

However, if the bill of lading is designated “prepaid” I believe that the shipper would still have primary liability for of the charges (line haul and accessorial charges), unless, of course the “non-recourse” section of the bill of lading was signed.

This is really something that you should work out with your vendors.

169) FREIGHT CHARGES - WHO PAYS DEMURRAGE?

Question: Our company was the consignee of goods purchased from a supplier overseas, the shipper. The goods were loaded into ocean containers and shipped into the Port of NY/NJ. As soon as the arrival notice was received from the shipper’s agent, our broker cleared the goods for entry and sent the delivery order back to the agent, two days prior to the last free day. Our broker was advised by the agent that due to congestion at the port the ocean carrier would not pick-up the containers before the free time ended. Our broker had to guarantee late charges to the pier to get the boxes released and avoid further detention.

This was a DDU (our city) move. We did everything in our power to ensure the goods were cleared and the D.O. issued well before free time expired. We had no control over the shipper’s agent or the carriers involved, who apparently failed to meet the free time deadline.

Is it reasonable to back charge the shipper for demurrage incurred by their contractors?

Under the Incoterm DDU (importers city) are demurrage charges incurred by the carrier the responsibility of the importer?

Answer: As you probably have determined, the term “DDU” as described in the ICC Official Rules for the Interpretation of Trade Terms (Incoterms 2000) does not specifically mention detention or demurrage at destination.

However, it does say “The seller must place the goods at the disposal of the buyer, or at that of another person named by the buyer, on any arriving means of transport not unloaded, at the named place of destination on the date or within the period agreed for delivery.”

Thus, unless the demurrage was actually caused by the fault of the buyer, I think that it would be reasonable to back charge the shipper for demurrage incurred by its contractors.

170) FREIGHT CLAIMS - "ACT OR DEFAULT OF THE SHIPPER"

Question: We are a freight broker that arranged for transportation of a cutting machine from Alabama to Ontario, Canada. The freight arrived damaged and the carrier is denying the claim stating “damage caused to this shipment was a direct result of a failure to properly secure the goods being shipped. As this load was placed on the trailer and inadequately blocked and braced by the shipper.”

However, the shipper reports that they loaded and secured the shipment the way the driver wanted it, saying he was giving them directives on how the machine should be loaded and secured.

The Canadian carrier quotes in their letter of denial the “Contract Terms and Conditions” section 1(b) of the Bill of Lading... ‘not liable by act of default of the shipper.’

My questions are 1) Doesn’t this place liability on the carrier for their driver’s actions, since he is involving himself in the loading? 2) Should the shipper have made notations on the bill of lading that the freight was loaded according to driver/carrier directives? 3) Would that matter in resolving this claim dispute?

Answer: Although the machine was loaded by the shipper, if the driver was present and observed the way it was loaded, blocked and braced, the carrier should be estopped from claiming that the loss was caused by the “act or default of the shipper”.

As a general rule, the primary responsibility for proper loading lies with the carrier. Federal D.O.T. regulations require the carrier's driver to insure that all cargo is properly and safely loaded, and to check the load from time to time while in transit, see 49 CFR Part 392.9 and 393.100. This subject is discussed in "Freight Claims in Plain English" (3rd Ed. 1995) at Section 4.8.3 and 6.5.1.

I would also note that, under the court decisions interpreting the "Carmack Amendment", 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 ("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.

171) FREIGHT CLAIMS - "SUBJECT TO COUNT" NOTATIONS

Question: Is a carrier responsible on a shortage where a receiver signed the bill of lading "subject to count" because they were not able to count the product at the time of delivery?

Answer: Consignees frequently make notations such as "subject to count" when there is a dropped trailer, or when palletized goods are delivered.

A shortage that is found after delivery raises a factual question: what was actually shipped, and what was actually received. If the shipper can prove the quantity shipped, and the consignee can prove that a lesser quantity was actually received, then the shortage must have occurred in transit, and the carrier would be liable for the shortage.

The fact that the consignee signed "subject to count" has no legal significance, and if there is a question as to what was actually received, the consignee should be required to provide appropriate evidence that the shortage could not have occurred after delivery.

172) FREIGHT CLAIMS – "ACT OF GOD" DECLINATION

Question: Our client shipped product freight prepaid to a customer in the Louisiana area before Hurricane Katrina. The hurricane made the shipment impossible to deliver according to the carrier. The carrier returned the goods to the shipper but refused to waive or reduce charges claiming "Act of God" made the shipment impossible to deliver.

How does the law look at this?

Is this a real case of the "act of God" provision being accurately used by a carrier?

Does the shipper have recourse with the carrier or the consignee (since the consignee requested they use this carrier)?

Answer: An "Act of God" is one of the common law defenses available to a carrier in a loss or damage case, but I have never heard it being used in the situation you describe.

I would say that the carrier is entitled to be compensated for the actual services that it performed, presumably picking up, transporting the goods to its terminal, returning the goods, etc. This would probably be less than the charges it had quoted to transport the shipment from origin to destination.

As between the shipper-seller and the consignee-buyer, I doubt that the consignee would have any liability since the goods were never delivered - a breach of the sales contract.

173) FREIGHT CLAIMS – "SPOTTED" LOADS

Question: What means the term "spotting" in truckload deliveries from point a (the shipper) to point b (the customer) and who is ultimately responsible for any shortage or loss of merchandise?

Answer: "Spotting" usually involves a situation where the carrier drops a trailer at the shipper's facility for loading, or drops a trailer at the consignee's facility for unloading.

Carriers are liable for any loss or damage that occurs while a shipment is in their possession, i.e., from the time of receipt of the goods and until there is a delivery of the goods.

As a general rule, the carrier's liability ends upon "delivery", and delivery has been defined by the courts to mean physical delivery in a manner that nothing further needs to be done by the carrier. You may wish to read Section 3.0 in *Freight Claims in Plain English* (3rd ed. 1995).

The real question, in most cases, is where a loss occurred. This is a factual question and a claimant has the responsibility to prove what was actually loaded into the trailer at origin and what was actually delivered at destination. Obviously, if a loss occurred after the carrier delivered the trailer - in the consignee's facility - the carrier would not be liable.

174) FREIGHT CLAIMS – "SUBJECT TO COUNT" NOTATIONS

Question: We made a shipment to one of our customers and almost two months later they informed us that they were deducting $1,422.00 from the invoice due to an alleged shortage. Based on the clear delivery receipt, we denied the request. They claim they are entitled to do this because they signed the delivery "subject to count". Is this acceptable?

Answer: There are a couple of issues here.

Obviously there is a factual question: what was shipped, and what was actually received. If you can prove the quantity shipped, and the consignee can prove that a lesser quantity was actually received, then the shortage must have occurred in transit, and a claim should be filed with the carrier.

The mere fact that the consignee signed "subject to count" has no legal significance, and if there is a question as to what was received, the consignee should be required to provide appropriate evidence that the shortage could not have occurred after delivery.

Whether the customer can deduct for a shortage is another question: which party (seller or buyer) had risk of loss in transit. This generally depends on the terms of sale - whether it is "FOB Origin" or "FOB Destination". If your terms of sale are FOB Origin and you can prove the goods were shipped, the buyer would still have the obligation to pay for them.

175) FREIGHT CLAIMS – "SUBJECT TO INSPECTION" NOTATION

Question: Does a notation on the delivery receipts of "Subject to Inspection" provide adequate notification that damages may have occurred during transit?

Answer: A notation "subject to inspection" has no legal significance.

The claimant still has the basic burden of proof: that the goods were tendered to the carrier in good order and condition at origin, and that they were short or damaged at the time of delivery.

It is always a better practice to inspect the goods when they are delivered and when the driver is still present, and to note any exceptions on the bill of lading or delivery receipt. If this is not done, then a claim becomes one for "concealed damages" and the claimant has the additional burden of establishing that the loss or damage existed at the time of delivery, and did not occur afterwards.

176) FREIGHT CLAIMS – "SUBJECT TO INSPECTION" NOTATION

Question: Upon delivery of a shipment from us, the consignee noted damage and took exception on the delivery receipt as follows: "subject to inspection-cartons damaged."

We filed the claim on behalf of our customer for this damage and the carrier has declined any responsibility or payment and cited the following reason: "your notation of 'subject to inspection' does not warrant damage being claimed. The delivery receipt is signed without any exceptions, subject to the same standards of proof as if the receipt were annotated."

Please advise if this is a valid reason to decline claim. The delivery receipt does state "cartons damaged" below the notation of "subject to inspection."

As far as we can see, exception was taken.

Answer: Although there appears to have been some notation at the time of delivery that there was visible damage to the carton, what you have is essentially a "concealed damage" situation.

All this does is shift an additional burden to the claimant to prove that the damage to the contents of the cartons did not occur after delivery. This can usually be done by a written statement or affidavit from the receiving clerk or supervisor - someone who has personal knowledge of the facts - describing how the shipment was handled upon delivery and how and when the damage was discovered.

I would suggest that you obtain such a statement and submit it to the carrier with a request that it reconsider its declination.

177) FREIGHT CLAIMS - ACCEPTANCE OF DAMAGED PRODUCT

Question: I have a situation where a driver picked up return product from a grocery store in Tennessee and delivered it to Atlanta, Georgia. These are frozen loads that must run at -10 degrees.

When the driver arrived in Atlanta the recipient checked the temperature of the product and it was at 39 degrees. Instead of refusing the product they signed for it, noting on the paperwork that the shipment was at 39 degrees.

I am a broker and when I called the trucking company who hauled the load they laughed, asserting that if the recipient in Atlanta knew the product was hot they should have never signed for and accepted the product even though they noted it on the bills.

I am looking at claim of $3,900.00 for 3 pallets of frozen pies. My question is if the recipient signed for the product and accepted it never writing on the bills "subject to refusal" or "accepted to dump, carrier will be charged for product" why am I looking at a claim? They signed for the goods. In my opinion they should have refused it and not have taken it off the truck. Who is right? Can the trucking company be held liable?

Answer: From your description of the facts, it is clear that the product was off temperature at the time of delivery, and that an exception was noted on the bill of lading or delivery receipt.

The fact that the consignee accepted the shipment does not preclude it from filing a claim if the product is damaged.

Since the consignee has a duty to mitigate the loss and to accept damaged shipments unless they are "substantially worthless", it was quite proper and reasonable for the consignee to accept the shipment and to determine whether it was fit for human consumption or otherwise salvageable.

178) FREIGHT CLAIMS – ACCORD AND SATISFACTION

Question: In July of 2006 a claim was submitted to me for crushed produce, which I paid. Now the customer is coming back with a new total and trying to get more money from the load that was closed out on July 13, 2006.

Can they come back just because their customer miscalculated the cost?

Answer: The following is an excerpt from *Transportation, Logistics and The Law* by William J. Augello:

> Furthermore, parties should keep in mind that when dealing with a claim, if one party accepts a check tendered by the other party for less than the full amount and cashes that check, then the payee of the check may be adjudged by a court to have accepted the partial payment as payment in full. Whether or not the cashing of the check constitutes acceptance of a settlement is fact dependent and governed by state law. Therefore, parties should look for endorsements on the check such as "payment in full" or words to that effect, and consult their attorney before depositing claim checks. See *Khoury v. Bekins Moving & Storage Co.*, 2000 Tex. App. LEXIS 4833, (Ct. App. 5th Dist. Tex. July 24, 2000) (When carrier issued a check for $16,100 based on the declared value, claimant cashed the check and then sued for over $100,000, held plaintiff entered into a valid accord and satisfaction).

If you paid a claim, and the claimant accepted and deposited your check, it would probably be considered an "accord and satisfaction". In other words, the claimant would be barred from attempting to reopen the claim.

179) FREIGHT CLAIMS – ACT OF GOD

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

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

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

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

180) FREIGHT CLAIMS – ACT OF GOD

Question: We are a transportation broker. We contracted with a carrier, to transport a shipment of control panels and conveyors from Livonia, MI to Canton, MS on a flatbed trailer. The shipper was very particular regarding the tarping of the load before it left their facility. The shipment left Friday 2/14 and arrived Sunday 2/16. That weekend, a huge snowstorm hit from the Plains up through the Ohio valley with record wind and snowfall. When the shipment arrived at the consignee, the tarps had torn and the shipment had rusted because it had gotten wet. The shipper sent someone to the plant in MS to clean the rust from the shipment. They forwarded to us a claim for $8,099.00 for the man-hours, hotel, airfare, etc. which we forwarded to the carrier.

Is the carrier responsible for payment of this claim or can this be considered an “act of God” and deny the claim to the shipper?

Answer: The “act of God” defense is only available to a carrier when the occurrence is a truly extraordinary and unpredictable event, AND if the carrier was free from any contributing negligence.

These are factual questions that depend on the particular situation. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 6.3 for a thorough discussion of this subject.

181) FREIGHT CLAIMS – ACT OF SHIPPER

Question: I have a carrier denying a claim stating: “The loss is a direct result of an act or default of the shipper and carrier negligence did not contribute in anyway. Our driver did not ‘knowingly’ receive this defective shipment. In *Allis-Chalmers Mfg. Co. v Eagle Motor Lines*, Inc., 55 Wis.2d 39, 198 N.W.2d 162 (1972), the court held that a carrier is exonerated from liability due to improper packaging or loading if it is ‘not apparent through ordinary observation’. It is unreasonable for a driver to detect through ‘ordinary observation’ that the shipper loaded the product 2-4 inches above Federal Highway Administration Size and Height limits. Only the shipping location has the necessary tools (ladders, tape measures, etc) to accurately verify that they are loading within legal limits. Clearly, in this situation, the method of loading was improper and the sole and proximate cause of the loss was an act of the shipper.”

The carrier was present at loading. The load was on a flatbed and consisted of three balers of different sizes. One baler hit the overpass. The DOT responded to the accident and verified that the overpass was 13’7 above the highway. When the freight was delivered it was measured at 13'8. What argument can I use to relieve the shipper from liability? Isn't the carrier responsible? I believe carrier negligence did contribute because it was their flatbed, thus their responsibility?

Answer: I can only give you a general statement of the law in this area; individual cases usually turn on the specific facts.

Under the Carmack Amendment, a carrier is liable for loss or damage unless it can prove that that the cause of the loss was one of the common law exceptions such as an “act of God” or an “act of the shipper himself”, AND that it was free from negligence, *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134 (1964)

Typically, in cases where the shipper's negligent loading is raised as a defense, the courts will look to see whether the defect is “latent” (concealed) or “patent” (visible).

The leading case in this area is *United States v. Savage Truck Line*, 209 F.2d 442 (4th Cir. 1953) in which the court stated:

> The primary duty as to the safe loading of property is therefore upon the carrier. When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.

In addition to the burden of proof under the Carmack Amendment, the *Savage* court also considered a provision of the Interstate Commerce Act requiring carriers to “furnish adequate facilities for the transportation of property and to establish and enforce just and reasonable regulations and practices relating to the manner of packing and delivering goods”, as well as the safety regulations of the I.C.C. (now the FMCSA) .

Ebasco Services, Inc. v. Pacific Intermountain Exp., 398 F.Supp. 565 (S.D. N.Y. 1975), involved a collision of cargo with the underside of a bridge. The court granted summary judgment to *Ebasco*, citing the ICC safety regulations, the Carmack Amendment and a provision

of the New York Vehicle & Traffic Law that imposes "absolute liability upon the operator of an over-height vehicle for damages sustained by virtue of an excessively high load..."

Alitalia v. Arrow Trucking Co., 977 F.Supp. 973 (D. Az. 1977) was another case in which the cargo (an aircraft engine) collided with an overpass. The carrier, Arrow, apparently admitted liability under the Carmack Amendment, but argued that certain additional leasing expenses were special or consequential damages and therefore unrecoverable. The court granted Arrow partial summary judgment on the issue of consequential damages.

Decker v. New England Pub. Warehouse, 2000 Me. 76, 749 A.2d 762 (2000) involved a suit by a carrier's driver for injuries resulting from alleged improper loading of a trailer by the shipper's warehouse. The court cited the *Savage* case, the federal safety regulations at 49 CFR Part 392.9, and held that Decker has not presented sufficient evidence of latent negligent loading, and affirmed judgment in favor of the shipper and the warehouse.

Thus, the general rule is that the carrier has primary responsibility to ensure that shipments are properly loaded, braced, blocked and secured. The carrier will be liable unless it can prove that the defect was "latent" (concealed) AND that it was free from negligence - even though there may be some negligence on the part of the shipper.

182) FREIGHT CLAIMS – ADDING HANDLING FEES TO CLAIM

Question: What is the legality of adding fees to claims, if a proper explanation has not been submitted? One of our customers has added two fees to the claims they are submitting; a "Handling Fee" for $250.00 and a "Transportation Fee" for different amounts. The Transportation Fee is understandable and we do not have a problem with it, but we do have a problem with this "Handling Fee".

The customer has stated they have talked to the carriers involved about the fees, but, to date, we have not seen any written documentation referring to these fees that explain them.

When we asked for the breakdown of the "Handling Fee" to substantiate $250.00 - their response was as follows:

Unload damaged freight
Check in damaged freight
Notate damage on bill
Scan in damaged freight to pay supplier
Apply a move tag to move freight to hold area
Move damaged freight to a hold area
Close move tag to hold area
Put claim sign on damaged freight
Gather information to file claim (inspect, costs, etc)
File claim
Log claim on claim spreadsheet

Some claims are for parts valued at $3.85 and they charge $250.00 handling - other claims are for parts valued at $4,000.00 and they add the $250.00 handling fee. These are claims for non-repairable parts.

Questions:

What right does the customer have to pass these "Handling Fee" costs to the carriers, particularly without the carriers' full understanding of what the "Handling Fee" represents?

If a carrier declines payment of the "Handling Fee" - is there any way to rebut the declination?

If a shortage claim occurs can the "Handling Fee" be added per the above statement of what constitutes "Handling Fee"?

Answer: In theory, your "actual loss" in a cargo loss & damage situation would include all reasonably foreseeable damages resulting from the breach of the contract of carriage.

As you know, if a shipment is partially damaged, there is usually a duty to "mitigate the loss". Thus, the reasonable expenses of inspection, segregation, repair, refurbishing, repackaging, etc. may be included in a claim, see generally, Section 7, *Freight Claims in Plain English* (3rd Ed. 1995).

However, since these claims are for "non-repairable parts", the "handling" charges that you have described do not fall into the category of expenses incurred in the mitigation of the loss, which would ordinarily be recoverable.

The "handling" charges that you refer to are also not damages for "loss or injury to the property" (the language used in the "Carmack Amendment"), and in this case would probably be considered "special damages".

Whether special damages can be recovered depends on the facts and whether the consequence of the breach of contract is foreseeable at the time the contract is made. The court decisions usually turn on whether there is actual or constructive notice that specific damages may be incurred.

Certainly you can make the argument that, even if goods are damaged in transit and are unrepairable, it is foreseeable that the shipper will incur some expense in processing the damaged goods and in preparing and filing a claim with the carrier. If the actual expense can be substantiated (and is reasonable under the circumstances), it should be recoverable.

Some shippers do add an administrative expense to their claims, and some carriers do pay it. On the other hand, many carriers refuse to pay them. As with any disputed claim, your remedies are limited: negotiate a settlement, submit to arbitration, or litigate in court.

With regard to your last question about shortage claims, it would seem obvious that there is no actual "handling", so most of the items listed would not be applicable.

183) FREIGHT CLAIMS – AFTER HOURS DELIVERIES

Question: As it pertains to cargo claims, what is the responsibility of the carrier when, at the time of delivery, the consignee is not present to sign the delivery receipt? My customer designs the routes and we are expected to deliver at the appointed window time. However, the majority of these deliveries are made after normal business hours. They continue to pressure me to pay claims that are filed by the consignee after the delivery has been made. My argument is that we do have a clear delivery receipt at the time of delivery (signed by the driver) and the fact that the consignee is not present to sign the delivery receipt should not be held against my company when we are simply delivering to the customer's requirements. At this point it's the consignee's word against the driver's word.

Answer: There is no simple answer to this problem.

Obviously, it is the best practice to have the consignee sign the bill of lading or delivery receipt and to make any notations as to damage or shortage at the time of delivery.

I find it difficult to believe that a prudent driver would leave freight at a consignee's facility without getting some kind of receipt or acknowledgement of delivery.

It would seem to me that there would have to be someone on the premises to accept a freight delivery and the driver should be able to get that person to sign the delivery receipt. If the person refuses to sign the delivery receipt, I would suggest that the driver make some appropriate record of the name and description of the person and the fact that he refuses to sign.

The other alternative is to refuse to deliver the freight unless someone signs (which would probably get their attention very quickly).

184) FREIGHT CLAIMS – AIR CARRIER TIME LIMITS

Question: When filing a concealed damage claim, what are the legal time limits for filing with the air freight carrier? I know that the air carriers have set their own time restraints, generally 14-15 days, but I seem to remember something about the same rules applying for concealed damage as with loss and damage claim filing.

Answer: DAMAGE CLAIMS

The time limits for filing claims on domestic air freight are set forth in the individual carrier's air waybill and tariffs, see The Official Local Cargo Rules Tariff (No. 95), published by the Airline Tariff Publishing Company ("ATPCO"). Time limits vary from 14 days in the case of visible damage to 9 months and 9 days for non-delivery.

The time limit for filing loss and damage claims varies significantly from one carrier to another, and it is important to check carefully the conditions on the air waybill and the carrier's rules tariffs. Note that time limits for filing claims on "small package shipments" are usually even shorter -- 45 or 60 days.

NOTICE OF CONCEALED LOSS OR DAMAGE

Claims procedures for domestic air freight carriers are generally covered in Rule G60 of the carrier's rules tariff. A typical rule provides that notice of loss or damage after a clear receipt has been given must be made within 15 days, and that the carrier has the privilege of making an inspection within 15 days of receiving such notice.

Receipt without an exception generally establishes prima facie evidence that the shipment was delivered in good condition, but numerous variations of this rule are published in carriers' tariffs. Claims may not be offset against freight charges owed, and will not be entertained unless freight charges are paid. Some carriers make an exception in the case of undelivered freight.

A few carriers provide for filing a "notice of intent" to file a claim within 30 days after delivery, or within 90 days for non-deliveries.

Note: For a detailed discussion of this subject, see *Freight Claims in Plain English* (3rd Ed. 1995) at Sections 16.2.4 & 16.2.7

185) FREIGHT CLAIMS – AIR FREIGHT CHARGES TO REPLACE LOST SHIPMENT

Question: We are a manufacturer of commercial refrigeration equipment. My question involves claiming air freight costs in shipping a replacement unit. The original shipment was lost in transit. It was eventually found and tendered for delivery, but by that time customer refused delivery. We had the original shipment returned.

Our customer could not wait for the carrier to find the original shipment nor wait for the replacement to come via truck. The shipment in question was late by 3 days based on carrier's transit time. The day the original shipment was to arrive the replacement shipment was shipped. The original shipment arrived 2 days after the air shipment.

Would the air freight charges be considered "special" or "general" damages? There were no notations on the bill of lading indicating when the consignee required the shipment. Nor was there any notice of consequences if the shipment would be delayed.

Answer: The court decisions are split on this issue, but the general rule is that the extra cost of shipping a replacement for a delayed shipment is considered "special damages" and is not recoverable unless the carrier has actual or constructive notice of the consequences of a delay at the time of shipment. This subject is discussed in Section 7 of *Freight Claims in Plain English* (3rd ed. 1995), more specifically in Sections 7.3.2 and 7.4.9.

186) FREIGHT CLAIMS – ALLEGED MISDELIVERY

Question: I have a situation whereby my client shipped an LTL shipment to a specific individual, residential delivery.

The carrier allowed another person to sign for the delivery and that person then shipped the goods out of the country.

The carrier maintains that they delivered to the correct address and that the person signing for the delivery is liable.

I spent over 20 years in the LTL business and I would have returned the shipment to the Terminal and issued an On-Hand Notice.

What is your opinion?

Answer: As a general rule, a carrier must deliver to the person named in the bill of lading and at the address specified in the bill of lading. If it fails to do so, it is considered a "misdelivery" and the carrier will be liable for any loss that is incurred.

However there are some decisions that allow a substantial compliance, for example, if the person who receives the goods has either actual or apparent authority to receive the goods (such as a spouse, family member, tenant, employee, etc. on the premises). This is solely a factual question, and depends on the circumstances. Thus, the real question is whether the carrier acted reasonably and without negligence in delivering the shipment to someone other than the person named on the bill of lading.

I would point out that if some unauthorized person did receive the goods and "shipped them out of the country", the owner would probably have a cause of action for conversion against that person, as well as against the carrier.

187) FREIGHT CLAIMS – AVERAGE VALUE

Question: I'm currently having problems with a carrier. A shipment of 24 cartons was picked-up in good condition and the driver signed for 24 cartons. Upon delivery the delivery receipt was noted 4 boxes short. The Carrier has declined to pay the full amount of our claim, and instead has sent a check for the average cost of items on the invoice because no item numbers were listed on the delivery receipt for shorted boxes. The gentleman I spoke with stated it is their company policy to only pay average amount whenever the item numbers for shortages are not noted on the delivery receipt.

The only things that I have found in my research on average cost have to do with air carriers. And when I spoke with him, I asked him to supply me with proof that their company policy was legal, and he has not done so, and stands by his original declination.

Is there anything else that I can do to get them to pay the full amount of the claim?

Answer: There is no "average value" rule in the situation you described. However, going back to basics, in a shortage claim, you have the burden of proving both what was shipped and what was actually received. Thus, if specific items were not noted as short on the delivery receipt, you should get appropriate receiving documentation or a written statement from the consignee, and provide that information to the carrier.

188) FREIGHT CLAIMS – BMC 32 ENDORSEMENT

Question: How do you respond to an insurance company who is declining payment of a BMC 32 Endorsement claim because a BMC 32 Endorsement is not attached to the contract carrier's cargo policy? The claim is for $189 and is financially crazy to pursue in court, but the carrier is not paying and now the insurance company isn't, either. Are we stuck?

As a member of TCPC, this service you provide is invaluable, and I sincerely appreciate your advice.

Answer: Go to the Federal Motor Carrier Safety Administration (FMCSA) website - www.fmcsa.dot.gov - and use the pull-down menu to access the "Licensing and Insurance" section. Find the carrier either by its name or its MC number.

This is the official record of whether there is a BMC-32 on file with the FMCSA. If it is, the insurer will be liable under the BMC-32, see 49 CFR Part 387. The fact that there was no endorsement physically attached to the carrier's insurance policy is completely irrelevant.

189) FREIGHT CLAIMS – BMC-32

Question: How is the BMC-32 letter submitted and to whom?

Answer: The BMC 32 is a federally-mandated minimum cargo liability insurance requirement for motor carriers engaged in interstate and foreign commerce.

The FMCSA (formerly ICC) regulations are found at 49 CFR Part 387.

The BMC 32 takes the form of an "endorsement" to the motor carrier's insurance policy. The regulations require the insurer to issue the BMC 32 endorsement, and to file a certificate of insurance (BMC 34) with the Federal Motor Carrier Safety Administration (successor to the I.C.C and FHWA). Once filed, the endorsement remains in effect until the insurer files a notice of cancellation (BMC 35) with the FMCSA, which requires at least 30 days before the effective date thereof. The insurer will remain liable under the endorsement if it fails to notify the FMCSA of cancellation. Cf. Nordstrom, Inc. v. Highway Group, Inc., 28 F.3d 107, 1994 WL 274025 (unpublished disposition) (9th Cir. 1994).

190) FREIGHT CLAIMS – BROKER CHARGING ADMINISTRATIVE FEE

Question: We are a transportation broker. We co-brokered a load with another transportation broker (we found the truck - they found the load). The load delivered with two cases damaged and refused. Our co-broker has created a claim form from calling their customer to get a verbal cost per carton, but refuses to provide written verification of the case price unless we pay them a $35 administration fee. Is this legal? Don't they have to file a complete claim in order to deduct? Without this paperwork, I'm not able to file claim with my carrier.

I plan on calling the co-broker's customer directly to avoid this cost (the claim is $25), but I didn't think a broker could add this administration fee to generate a legitimate claim. Would you please advise?

Answer: It is not "illegal" for the other broker to refuse to provide information unless you pay them a $35 administration fee, although it is a stupid practice if they want to encourage good business relationships.

You have no legal obligation to file the claim, so maybe you should just tell the shipper to file the claim directly with the carrier, and get out of the middle.

191) FREIGHT CLAIMS – BROKER LIABILITY AND TIME LIMITS

Question: We are freight broker who arranged a load to be picked up for one of our customers/shippers and we are being told there were some shortages on the delivery of the load. Now they want to file a claim against us. What is the time they have to file this claim against us?

Answer: First, you should advise the customer that the claim should be filed against the motor carrier, and not against your company as the broker. Explain to them that, as a broker, you do not assume any liability for loss or damage in transit. You may wish to assist them in filing a claim against the carrier, but you should not accept liability for the alleged shortage.

As to time limits for filing claims against carriers, most carriers issue some form of the Uniform Straight Bill of Lading, which provides that claims must be filed in writing with either the originating or delivering carrier within nine (9) months of delivery, or in the case of a non-delivery, nine (9) months from a reasonable time for delivery. If the bill of lading that was issued does not either state a time limit or incorporate a time limit in the carrier's tariff, then there is no minimum time to file a claim, although the court decisions indicate that it must be a "reasonable" time.

The subject of time limits for filing claims and commencing lawsuits is covered in Section 9 of *Freight Claims in Plain English* (3rd ed. 1995).

192) FREIGHT CLAIMS – BROKER LIABILITY FOR DELAY

Question: We are a transportation brokerage. A frequent customer of ours was a poultry trader based in Pennsylvania. They hired us to find a truck to haul a load of fresh chicken from Alabama to Massachusetts. They requested the load to be picked up on 1/31 and delivered on 2/2. The closest truck we could find did not arrive at the shipper until past their loading cutoff and had to be loaded the next day. The truck was not loaded and on its way until after noon on 2/1 (the consignee is 1286 miles from the shipper). We communicated all of this information as it occurred, to our customer, the trader. The truck was not able legally or physically to make delivery on 2/2, our customer informed us then that their might be a problem because the market had dropped on chicken 10¢ per lb., and their receiver was looking for a reason to reject the load and buy at the lower price. The truck arrived at the receiver at 5am on 2/3 and was unloaded and the bills of lading signed without any notation. On 2/7 we received a fax from our customer saying they were charging us 11¢ per lb. ($4400.00) because we delivered late, plus $150.00 for late pick up. The freight rate on this load was only $1650.00 and they withheld the balance of this "deduction" from monies due us on previous loads we hauled for them. My question is what can I do to recover this money?

Answer: There are a number of legal issues here.

First, you are entitled to be paid the agreed freight charges since you performed the contract for transporting the shipment.

Second, as a broker, you are generally not liable for loss, damage or delay claims unless you specifically undertake that liability, or are somehow negligent in your performance.

Third, the customer is asserting a claim for delay. Claims for loss, damage or delay are subject to different legal principles. In this situation, the legal obligation is to transport with "reasonable dispatch", unless there is some other special agreement. Normally, from the limited facts you have given, a carrier would not be liable for the market decline and the damages sought by the shipper would be considered "special damages". On the other hand, if you had agreed to deliver by a certain date or time, and the shipper had given you actual notice that there would be damages if the shipment were delayed, you could be liable. (I would note that these subjects are discussed in depth in *Freight Claims in Plain English* (3rd Ed. 1995))

If you cannot resolve this dispute, your recourse is to bring a suit against the shipper to recover your freight charges. You can either hire an attorney or try to handle the matter yourself in a small claims court. Be aware, however, that the shipper will interpose a counterclaim for its delay claim; whether the counterclaim will be sustained depends on the factors discussed above.

As an observation, I note that your agreement with the customer appears to be entirely verbal. If you want to avoid this kind of problem in the future, you should enter into written transportation contracts with your shippers.

193) FREIGHT CLAIMS – BROKER LIABILITY FOR LATE DELIVERY

Question: We are a freight brokerage company based in Burlington, NJ. We have a customer that wants to bill us for damages related to a late delivery on a job site. The charges are exorbitant - $8300. The freight was initially tendered to us as a less-than-truckload ("LTL") shipment with no designated delivery date. While the shipment was in-transit, we were told that the shipment had to deliver on a set day, much earlier than we expected. We tried to accommodate the customer by switching carriers in-transit at a cross-dock to get the shipment delivered earlier. The customer apologized for not giving us specific information at the time of first dispatch. Unfortunately, the second carrier that we assigned to remedy the problem dropped the ball and delivered on a Monday as opposed to the Friday before. Our customer now claims that the crew had to sit over the weekend. Now the customer wants to pass the customer to us. Do they have any legal grounds to do this? They currently owe us over $4500 in unpaid freight bills. They want to not pay these invoices.

Answer: Your question raises three separate issues.

1. Your liability as a broker.

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.

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 as to delivery requirements.

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.

Whether or not you may be liable for the loss or damage to this shipment depends on the specific facts and circumstances. In any event, if a claim is filed against your company, you should do two things: (A) advise the shipper that you acted solely as a broker and did not assume any liability for the loss or damage, and (B) promptly transmit the claim to the responsible motor carrier.

2. The motor carrier's liability.

Ordinarily a common carrier only has a duty to deliver with "reasonable dispatch" and would not be required to deliver within a specific "window" or by a time certain. However, where a carrier agrees in advance to deliver by a particular date or time, that becomes an enforceable contract. In the circumstances you have described, the carrier could be liable to the shipper for failing to deliver on the agreed date if it had notice as to the consequences of a missed delivery.

3. The shipper's liability for freight charges

In a brokered situation, the shipper's contract is with the broker, not the carrier. Thus the broker has a right to collect its freight charges from its customer regardless of whether there may be a loss or damage claim. If the shipper has paid freight charges, it may be able to recoup them as part of its loss or damage claim against the responsible carrier.

194) FREIGHT CLAIMS – BROKER LIABILITY FOR WARM ICE CREAM

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

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

I know that it is the carrier's responsibility to inspect the product when loaded and if they find any problems they should not accept the product until the problem has been corrected. The carrier said also that they were not told of what temperature to use, so it would not be their fault that it wasn't cold enough when delivered. Wouldn't you think that if a carrier is accepting a load of ice cream they would make sure of the temperature before loading it?

Regardless if they were told or not?

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

Answer: First of all, I would hope that you have a contract with your shipper that makes it clear that you are acting as a broker, not a carrier, and that you are not liable for loss, damage or delay to shipments.

If all you are doing is attempting to assist your customer with the filing or processing of the claim, that is fine, but you should not be assuming responsibility for transit loss or damage.

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

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

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

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

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

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

195) FREIGHT CLAIMS – BROKER LIABILITY

Question: We are a freight broker in South Carolina. The majority of the freight we handle is grocery, often bought and sold between diverters. These loads may pass through two or

three hands until one of our customers ends up with the product. We often send a truck to pick up a load as someone other than our customer (a blind pick up) to protect the confidentiality between their suppliers and customers. I have found little information addressing the subject of grocery claims and would like your opinion. I have handled several claims where the driver is not allowed on the dock and the shipper loads short or loads damaged product, which the driver signs for. When the driver delivers, the damaged product is refused or he is delivering short. Our customer deducts the amount damaged or short from our invoice. What is supposed to happen in a situation like this (SL&C)? Our customer won't go to the shipper (to protect their supplier) so they deem it the carrier's fault and hit us, the broker, with a claim, which we are supposed to pass on to the carrier. As, you can imagine, most carriers are not happy at all in this situation. I sympathize with them, but at the same time, I can't eat all of those claims (groceries can be very expensive). Can we have our customer claim against the carrier directly and get us out of the loop? Any thoughts or information would be helpful.

Answer: Brokers, as such, generally are not liable for loss or damage to shipments because they are not carriers and they do not actually handle or transport the goods.

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

I would note that a broker could be liable if it were negligent. For example, suppose the shipper gave instructions to the broker that a load required refrigeration at 34 degrees and the broker failed to arrange for a reefer truck or did not tell the carrier that the load required protective service. Then the broker might be liable. This subject is covered in Freight Claims in Plain English (3rd Ed. 1995) at Section 13.2.

My best advice is to make sure, in writing and before doing any business, that the customer knows that you are a broker and that you do not assume any liability for loss or damage in transit. This can be done with a notice on your rate quotations or, better yet, with a properly drafted broker-shipper contract.

196) FREIGHT CLAIMS – BROKER LIABILITY

Question: I have a claim with a broker company. The driver of the carrier for the broker broke a seal himself off of a trailer and we refused the load. This is stated in our policy and guidelines that I have given to each one of my salespeople of the carriers I use. The broker is telling me that I have to go after the actual carrier and not them, the broker. I would think that the broker should be responsible for paying my company and then they can go after the carrier. What do you think?

Answer: The broker is correct; you should file your claim directly with the carrier (in writing).

Brokers, as such, generally are not liable for loss or damage to shipments because they do not actually handle or transport the goods. There may be situations where a broker could be liable if it were negligent. For example, suppose the shipper gave instructions to the broker that a load required refrigeration at 34 degrees and the broker failed to arrange for a reefer truck or did not tell the carrier that the load required protective service. Then the broker might be liable. This subject is covered in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 13.2.

197) FREIGHT CLAIMS – BROKER LIABILITY

Question: Our company contracted with a transportation broker to arrange pickup of two inspection machines. The trucking company he contracted with did not secure units in trailer

causing one of the units to be damaged. The bill of lading was noted for concealed damage. Total cost of each unit was $70,000, with a total load value $140,000. We filed a damage claim for $56,000 against our broker for repair of the damaged unit. The carrier he contracted with had $100,000 of insurance. This carrier's insurance company pro-rated the claim and mailed us a check for $36,834.50. Is this common practice? Can I file a claim against our broker for the difference?

Answer: As a general rule, brokers are not liable for loss, damage or delay to goods in transit. However, a number of recent court decisions reinforce the principle that brokers can be liable if they are negligent, and their negligence causes or contributes to the loss, see e.g., *Professional Communications, Inc. v. Contract Freighters, Inc.*, 171 F.Supp.2d 546 (D.Md., Oct 17, 2001) (NO. CIV. CCB-00-CV1309); *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 WL 965686 (N.D.Ill., Oct 15, 1999) (NO. 98 C 5182); *Commercial Union Ins. Co. v. Forward Air, Inc*., 50 F.Supp.2d 255, Fed. Carr. Cas. P 84,107 (S.D.N.Y., Jun 14, 1999) (NO. 98 CIV. 6814 (AGS)).

If the broker was negligent in some way (carrier selection, improper instructions, etc.) you might be able to collect something from the broker. Otherwise, your remedy is against the carrier. The fact that the carrier's insurance company did not pay your claim in full is irrelevant and you should pursue your claim for the balance of the amount against the carrier (unless you signed some kind of release that released both the insurer and its insured when you accepted the check from the insurance company).

198) FREIGHT CLAIMS – BROKER OF EXEMPT COMMODITIES

Question: Our brokerage (we also run three truck lines) has just started doing business with some produce brokers. The basic problem is when damage occurs. It appears to be the rule, not the exception, that produce people will short pay the load instead of file a claim, or hold pay until the claim is satisfied by the insurance company of the carrier. As this product is an exempt commodity, what remedy is available to us? At the present time, we have a produce shipper withholding $30,000 in freight charges to cover a claim that will amount to about the same amount. Obviously, the $30,000.00 is the total amount of about eight loads.

Any advice you can give is appreciated. I've been reading your opinions over the last year or so and have found them very helpful.

Answer: It is not an uncommon situation for brokers to be caught "in the middle". As a general rule, a broker should not be liable for loss or damage to goods in transit (unless the broker has agreed to assume common carrier liability, or unless the loss/damage is caused by the broker's negligence).

If the shipper (or consignee) offsets claims against freight charges, your only remedy may be to bring a lawsuit for your freight charges. I would note, however, that the shipper will probably counterclaim for its loss/damage claims, which complicates the case. (We are litigating a number of these at present.)

Your best protection is to have good written transportation agreements with your shippers (and with your carriers), which spell out your liability for loss/damage claims. In addition, it is very important that your brokerage operation be kept separate from your motor carrier operation, and that you always make it clear to customers when you are acting as a broker. You should use different paperwork for your rate quotations and invoices, state your terms and conditions clearly on these documents, and make sure the customer signs and returns a copy of the rate quotation.

199) FREIGHT CLAIMS – BROKERS HANDLING CLAIMS

Question: What is the proper procedure to follow when we receive a damage claim from a customer? We are a freight broker who hired a trucking company to haul freight for one of our customers.

Answer: First, you should not be "in the middle" when it comes to loss or damage claims. As a broker, you should always make it clear to your customers that you are a broker and not a carrier. If possible, you should have written transportation contracts with your shipper customers that state your only responsibility is to transmit claims to carriers on their behalf and to assist in processing their claims.

In any event, since you have apparently not done this, you should promptly advise your customer that you will file the claim for them with the carrier, but that you do not assume any responsibility for collection.

200) FREIGHT CLAIMS – BROKER'S LIABILITY

Question: We made arrangements to have a truckload of product picked up in Miami, Florida. We got the carrier from an on line posting service. We checked the name, MC number and got the Certificate of Insurance before the load was picked up. We sent routing instructions and our package via fax and the carrier sent us back confirmation and we checked their authority and insurance on line.

The carrier picked up based on our routing instructions and we were in contact with the carrier over the next two days. We were told the truck was having mechanical problems on the third day and by the 4th day we were getting suspicious that something was not right. On the fourth day we were told he was lost and then we lost communication with the driver and the dispatch. No one would answer the phones.

We used Carrier 411, checked the MC further, called the insurance company and finally did get a hold of someone at another number for this carrier name in Miami, Florida. The owner said they never picked up this load.

At this point our customer is aware of the situation and we have contacted the police in Miami. They were very helpful, and did call the carrier and visit the shipper. However their hands were tied and they could not do much more.

Our customer hired a private investigator (spent approx $8,000) and flew down to Miami to meet with him at least two times (spent approx $2,500.00). The investigator, with our help providing names, times and other information and with the help of the police was able to find this truck. Some of the goods were recovered but approximately $23,000 in product is missing.

Our customer did not want to go its insurance company for many reasons, fear of losing their insurance, higher rates etc...

As it turns out the driver may have been a recent employee of the trucking company that does exist in Miami, under this authority and with this insurance.

Our customer now wants us to reimburse them for some of their loss. My question to you is: are we at all liable for a stolen truck in a situation like this? We did our due diligence by getting the MC number and the Certificate of Insurance. It turns out that there was identity theft and that there is a ring of thieves that are doing this in the area.

From a legal standpoint do we have any liability to our customer for the freight stolen?

Answer: The liability of a broker has been discussed in this "Q&A" forum before, and I think the following addresses your question:

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. This may happen because the company holds dual authority as a carrier and a broker, commingles functions, uses common dispatchers, etc. 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. Third party logistics providers often claim to be "all things to all people", without distinguishing the different legal roles involved.

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.

From your description of the facts, it would seem that you were not negligent in selecting this carrier. Unless there is some course of dealing that would indicate you were holding out as a carrier, or had otherwise assumed liability, I do not see how you would be liable to your customer for this loss.

201) FREIGHT CLAIMS - BROKERS

Question: We are a freight broker. My question is this: When we receive claims from a customer, must the freight always be made available for inspection for every claim? If the carrier's driver signs the Bill of Lading ("B/L") with a damage, short, or overage, are they accepting responsibility on the claim?

If the claim is for $500 and their deductible is $1000 what are our options to ensure carrier payment?

Could you suggest a book that maybe useful for a brokerage company on claims?

Answer I will attempt to answer your questions.

1. First, as a broker, you normally would not have any liability for loss or damage. Shipper claims should be submitted by the shipper to the carrier, and not to you. If you do receive a claim, you should make sure that the shipper knows that you do not assume any liability, and are merely assisting them in filing the claim with the carrier.

2. Regarding inspection, it is always a good practice to promptly notify the carrier when loss or damage is discovered, and to hold the damaged goods and the packaging for the carrier's representative to inspect them.

3. If a driver signs or acknowledges that the shipment is damaged, short or over on the delivery receipt at the time of delivery, it would constitute an admission as to the facts as stated on the delivery receipt. It does not necessarily mean that the carrier is accepting responsibility for the claim.

4. I assume you are referring to a deductible in the carrier's cargo legal liability policy. The carrier's liability has nothing to do with whether there is a deductible (or exclusion) in its insurance policy. All that means is that the insurance company will not indemnify the carrier for his liability to the shipper.

5. I would recommend that you obtain a copy of *Freight Claims in Plain English* (3rd Ed. 1995), which is available from the Transportation & Logistics Council, Inc.

202) FREIGHT CLAIMS - BURDEN OF PROOF

Question: Please advise with a problem on a freight claim that has been denied. We are a metal perforator. We shipped 2 skids of steel galvanized sheets via a LTL carrier whom we've used in the past. The skids were well banded and edge protected. The consignee refused the material because of the condition that they arrived in. Because they needed these parts in a hurry, we had the carrier bring them back to us so we could access the damage & possible rework. The steel sheets were bent & wrinkled beyond repair. The skids & banding were not original. Most of the sheets were barely skidded to the pallet. (It honestly looked like they fell off the truck!)

We had the freight inspected by the claims inspector, and a claim was filed for invoice price less scrap value. I informed them of the cost of raw material when processing the claim, & sent all necessary copies of forms necessary along with pictures (which told a lot). Their reason for full denial is that we did not package correctly. They said that as an LTL carrier, they have a right to fill their trailer, thus stacking on top of our freight. We had "Do Not Stack" label on the skids. Their response was that "high value" freight should have been crated. These were 48" x 96" sheets. Our total claim came to almost $7,000.00. To make matters worse, they managed to damage the replacement material. Their answer to that was, "of course, you probably didn't crate it". We ship skids of material out of here daily via LTL carriers, as well as truckload without any problems. The carrier flat out refused any kind of settlement. What is our next step or do we have to accept their decision?

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 (the carrier) 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.

203) FREIGHT CLAIMS – CARRIER BANKRUPT

Question: A carrier lost half of the load we shipped to a customer located in California; the load was tendered just before the carrier went bankrupt. The shipper prepaid the freight. The carrier cannot locate the lost skids and representatives of the company seem to have no interest in assisting us now. Is there any chance of recovery? I was under the impression that the carrier was bound to make our delivery, and am uncertain what to do in this situation.

Answer: You should definitely file a claim for the shortage. If this shipment would normally have been delivered after the date of filing the bankruptcy petition, your claim should be filed as a "post-petition" claim, which would put you in a better position to collect.

204) FREIGHT CLAIMS – CARRIER BURDEN TO SUPPORT DECLINATION

Question: Are carriers required to provide supporting documentation of a declination? I filed a claim for loss, a full pallet of freight, the LTL carrier has declined the claim due to "clear receipt". The bill of lading shows the carrier was tendered 7 pallets and signed for 7 pallets but the delivery receipt the carrier generated only shows 6 pallets.

As you can imagine my receiving location only signed for 6 as shown on the delivery receipt.

The carrier is claiming they were only tendered 6 pallets and only 6 moved through their system at each point of transfer.

I requested documentation from each terminal that the shipment moved through but the carrier is telling me that the documents are no longer available. Is the carrier required to provide documentation to support their claim that the shipment moved entirely through their network as only 6 pallets?

Answer: The carrier is required to comply with the Federal Motor Carrier Safety Administration ("FMCSA") (formerly Interstate Commerce Commission or "ICC") claim regulations at 49 CFR Part 370, "Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage". (The regulations are available online at

http://www.access.gpo.gov/nara/cfr/waisidx_02/49cfr370_02.html).

Every claim for loss or damage must be investigated and the carrier's liability will depend on the specific facts. The thing to remember is that the claimant has the burden of proving that the goods were received by the carrier at origin, and that there was a shortage at the time of delivery.

If the carrier actually receives and signs for the items shown on the bill of lading, and the consignee notes or records a different quantity at the time of delivery, those documents should be sufficient evidence as to what was actually received and delivered. The fact that the carrier cannot explain the shortage or how it may have happened, is not a valid defense or reason for declining the claim.

I would note that these subjects are covered in *Freight Claims in Plain English* (3rd Ed. 1995), which is available from the Council.

205) FREIGHT CLAIMS – CARRIER CREDIT FOR UNRELATED SHIPMENTS

Question: I have a carrier that continually wants to return product that is not related to the claim in question for credit against that claim. I am leery to accept this, as sometimes the labels (normally there are labels on each shipment that identifies the purchase order, etc.) that are on the product are from a shipment that was shipped several months ago. I have no idea why they keep the product so long? Then there is the possibility that the pallet they want to return is actually a shipment that they received over at first break that was not intended for them. Or the product could be related to another claim not yet filed. Please provide any insight in matters such as this.

Answer: The carrier is required to comply with the Federal Motor Carrier Safety Administration ("FMCSA") (formerly Interstate Commerce Commission) claim regulations at 49 CFR Part 370, "Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage".

Each shipment is represented by a separate contract of carriage -- the bill of lading. Every claim for loss or damage must be investigated and the carrier's liability will depend on the specific facts. If there is a shortage on a particular shipment, and the carrier subsequently finds the product or item in its system, it should be returned or delivered in accordance with the original bill of lading, at which time the claim can be adjusted.

I would note that these subjects are covered in *Freight Claims in Plain English* (3rd Ed. 1995), which is available from the Council.

206) FREIGHT CLAIMS – CARRIER DECLINATIONS

Question: We are a small home furnishing retail location. We ordered sheets of solid surface (corian type) material for a customer for a kitchen counter installation. We prepaid for both the material ordered and the shipping charges. The shipper chose the freight line.

When the material was delivered to our warehouse/garage pieces of the material fell out of the crated package and their driver immediately called the freight line's claims department to note there was damage to this delivery. He received a claim number at this time and it was noted on the delivery bill. We thought that there was a possibility we could still use this material if damage was only to one outside edge. We removed strapping and top layers of packing material and saw that the damage was more significant, with probable stress cracks running through the material. (this damage was likely to have been done by fork lift error). The driver was unable to take the material back at that time as it had been unstrapped from its pallet to inspect. We immediately called the freight line and were faxed a claim form which we completed and returned to the freight line by certified mail the same day (May 1).

We received the first denial from the freight line based upon their need to inspect material. We set up appointment with an inspector who came promptly. We received the second denial as the inspector noted that there might be a possibility for some portion of material to be used. We checked with the shipper who found "no salvage value" and sent a letter to carrier noting the same.

The third denial came from freight line, this time they noted that it was the shipper's responsibility to assure that material was packaged correctly, and at this time they felt the material was not crated properly. The shipper sent a long letter to the freight claims adjuster describing just how material was packaged for delivery as well as a notation that the representative for the freight line had been to their (the shipper's) location and they were quite impressed with the care the shipper took to protect material to be shipped. The freight line's representative even took pictures of the shipper's procedures and noted that he was impressed. And the bottom line is they accepted the material as it was presented to them (if I bring something to UPS in a paper bag and they don't like how it looks, they don't take it from me!)

Our fourth denial was received stating that even though they did not admit liability for the damage they would offer an amount $657.00, or approximately 1/2 of what I actually paid for the material. They based their offer on a tariff rule that allows them to limit their liability to 5 times the amount of the freight charge to be paid. They also claim that they are able to do this as the shipper did not check the box that lets them know the value of the material they were being asked to transport. This is patently absurd. Stamped in large letters across the bill of lading are the words "fragile HIGH CLAIM VALUE, use extension forks". Also on the top and bottom of the crated package in bold red letters were the same warning "FRAGILE HIGH CLAIM VALUE". The representative who solicited the shipper's business was well aware of the product the shipper was tendering for transportation and the material is all of relatively the same price per sheet and all has a high claim value.

At this point I have stored the material in my garage for over 10 weeks, the customer has cancelled the order, to say nothing of being completely enraged over the amount of time it has taken to solve this matter. Now I feel the claim should include storage of the material and my lost profit.

The question is, am I the one who should be pursuing the freight line to settle this claim or should my claim be against the shipper who contracted with the freight line on my behalf? I cannot tell from the original bill of lading exactly what type of bill of lading it is. As the consignee over the past 10 years in business there have been several times I have had to make a freight claim as damage to furniture in shipping is not uncommon. I have always dealt directly with the freight company and with a little perseverance on my part the claims have always been settled.

I have never seen anything like this. I am now waiting for the denial that says: we never pay any claim no matter what!

Answer: The first issue is the carrier's liability limitation that you describe as "5 times the amount of the freight charge to be paid". It is possible that this may be an enforceable limitation, but only if the carrier complied with certain requirements: a bill of lading that expressly incorporates an applicable rules tariff by reference, reasonable notice of the limitation and an opportunity to select between full and limited liability rates, etc. At the very least, we would need to review the bill of lading and the complete tariff upon which the carrier is basing its limitation to determine if it is enforceable.

The second issue is which party (seller or buyer) had "risk of loss" in transit. This is determined by the Uniform Commercial Code. As a general rule, if goods are sold "FOB Origin", the risk of loss passes to the buyer when the goods are tendered to the carrier at origin. Most likely, if there was no specific agreement as to your terms of sale, this sale would be considered "FOB Origin", and the buyer-consignee would be the proper one to pursue the claim against the carrier.

It certainly sounds as though this carrier is not acting with good faith in resolving this claim, but unfortunately in these situations your only remedy may be to bring an action in small claims court.

207) FREIGHT CLAIMS – CARRIER DUTY TO PROVIDE SUITABLE EQUIPMENT

Question: Our carrier loaded a load of roll stock paper and it appears that there were nails that were protruding up from the floor of the trailer that were not visible. The nails caused considerable damage, tearing the outer edges of the roll paper. As a result, the shipper is filing a claim.

The questions are: Shouldn't the shipper take some responsibility in loading? Wouldn't this be construed as concealed damage? Should the shipper have notified us that they were loading roll stock paper or should they have clarified in detail what was needed for equipment?

Answer: 1. The carrier has the duty to provide suitable equipment.

2. The shipper should normally inspect the equipment to see if there are any visible problems (holes, dirt, etc.) before loading. However, you state that the nails were not visible.

3. This is not "concealed damage". See *Freight Claims in Plain English* (3rd Ed. 1995), Section 11.1.

208) FREIGHT CLAIMS – CARRIER LIABILITY ON BROKERED LOADS

Question: My clients are primarily freight brokers. On occasion, after brokering a load to a motor carrier, they will find out, after the load has been lost or damaged, that the motor carrier who had accepted the load and signed a rate confirmation had doubled brokered the load to another carrier (usually an owner/operator). On most occasions, the carrier has a signed broker/carrier agreement. What is the initial motor carrier's liability? Their insurance company's? Is there any case law addressing this issue?

Answer: The carrier that receives the goods at origin and issues a bill of lading is liable for loss or damage to the goods under the "Carmack Amendment" (49 USC Section 14706).

Other intermediate parties (brokers, etc.) can also have liability if they have contractually assumed liability or if they are negligent, and their negligence causes or contributes to the loss or damage.

209) FREIGHT CLAIMS – CARRIERS' CLAIMS PRACTICES

Question: We are a third party provider for claims for several large companies. One of the company's carriers is insisting on a "proof of loss statement" ("POL") from a ship to customer. This customer is not willing to sign it. Can the carrier hold up payment based on the consignee's refusal to sign the POL statement.

Answer: 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 at the time of delivery. These are factual questions that depend on the specific situations of each shipment, and the carrier has the right to ask for information or documentation that supports the claim.

You should also be aware that carriers' claim practices are governed by federal regulations of the Federal Motor Carrier Safety Administration ("FMCSA") (formerly the Interstate Commerce Commission ("ICC")) that are found at 49 CFR Part 370, Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage..

As relevant to your question, Section 370.7 provides:

§ 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.

(b) Supporting documents. When a necessary part of an investigation, each claim shall be supported by the original bill of lading, evidence of the freight charges, if any, and either the original invoice, a photographic copy of the original invoice, or an exact copy thereof or any extract made therefrom, certified by the claimant to be true and correct with respect to the property and value involved in the claim; or 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; Provided, however, That where property involved in a claim has not been invoiced to the consignee shown on the bill of lading or where an invoice does not show price or value, or where the property involved has been sold, or where the property has been transferred at bookkeeping values only, the carrier shall, before voluntarily paying a claim, require the claimant to establish the destination value in the quantity, shipped, transported, or involved; Provided, further, That when supporting documents are determined to be a necessary part of an investigation, the supporting documents are retained by the carriers for possible FHWA inspection.

(c) Verification of loss. When an asserted claim for loss of an entire package or an entire shipment cannot be otherwise authenticated upon investigation, the carrier shall obtain from the consignee of the shipment involved a certified statement in writing that the property for which the claim is filed has not been received from any other source.

You can review the relevant provisions of the code of federal regulations online at http://www.gpoaccess.gov/cfr/index.html by searching for "49cfr370".

210) FREIGHT CLAIMS – CHARGES FOR REPLACEMENT STOCK

Question: We are a warehouse in California for our company, which has its production facilities in Arkansas. Our terms of sale are F.O.B. origin and the material we sell comes to us by sealed 53' trailers directly from our factory.

Many of the orders on this trailer are special orders manufactured at our plant in Arkansas and sent out to us to re-ship to our customers in the Western United States.

We are charged a rate of approximately $0.17 a pound to get this material from Arkansas to California for us to reship. We do not get individual freight bills for each shipment showing freight cost. Charges are based on trailer load.

Whenever we have damage on one of the reshipments that we ship from California we include the cost of this freight (from Arkansas to California) in our claim to the carrier.

Several times recently, the carrier has declined payment of these stock truck freight charges citing that "we find that you have included stock truck freight charges...for the movement from Arkansas to California. Under the Carmack Amendment, the shipper is only entitled to recover from the carrier the actual loss or injury to the property."

Is this a correct interpretation of the Carmack Amendment or can we recover the freight cost of getting the replacement order from our production facility to our California warehouse to re-ship to our customer?

These stock truck freight charges are always included as separate items on our invoices to our customers so are documented on the copy of original invoice we submit with our claims.

The carrier does ship the replacements for damage on a "deadhead-free astray" basis so there is no additional charge for the replacement from California to our customer. If they did charge us to send the replacement material, then we could collect reimbursement for the original freight charge on our claim.

I fail to see why we cannot submit, and be paid for, our stock truck freight charges when we have to pay a second time to get material out to us.

Should not the stock truck freight charges be considered part of the destination value of the goods and be recoverable by us?

Answer: I think you may be mixing "apples & oranges" here.

I assume that the carriers you are referring to pick up product at your California facility and deliver it to customers in that general area. If a shipment is lost or damaged while in transit to a customer, the usual measure of damages would be the invoice price to the customer (sometimes referred to as the "destination market value"). I assume that this would normally include your FOB origin price, plus all the freight charges from origin (Arkansas) to the destination (customer/consignee location).

The carrier's liability is for the loss or damage to the original shipment that it transported pursuant to a contract of carriage (bill of lading).

Whether the lost or damaged shipment is replaced with other product or whether the carrier voluntarily transports replacement product on a "deadhead-free astray" basis is irrelevant.

211) FREIGHT CLAIMS – CLASSIFICATION LIMITATIONS

Question: We ship electrical cable on reels and in coils. Most of our material is NMFC 61150 with some small amounts of NMFC 61183. I believe that I understand the requirements, both for shipping and the handling of claims, as it relates to the NMFC 61183 material. We seem to continually debate with carriers however their liability as it relates to our other material, NMFC 61150. We believe we are fair and mitigate our claims to the smallest carrier liability in all cases. This is our process:

We require that we take possession of all damaged goods due to liability concerns over damaged material making it into a field application. When the material is returned we process the cable to ultimately recover material that is structurally intact. Our material is sold off the rack in industry accepted standard package lengths and in some cases a given product could be sold in several different lengths. There comes a point however when the length recovered in our salvage process becomes non-salable and must be scrapped. We credit our carriers back for any salable material recovered, any scrap metal value at our current internal price, and do not charge them for any associated reworking costs such as manpower or machine time.

When reworking the material we document how much material is lost due to damage and how much due to non-salable lengths if applicable. One carrier in particular says that they are only liable for the portion damaged in the situations where the entire length is lost due to a combination of damage and non-salable lengths. We claim otherwise. They then say that if the entire package was lost that the material is NMFC 61183 and was not shipped as such therefore they are off of the hook. We say no, the material is not cut for a specific job and it is therefore under NMFC 61150 and round and round we go. I have always thought that they were to make us whole as a general rule. Is there any legal precedent or help you can provide to me to counter their position? Is it possible we have been mistaken in our position all these years?

Answer: I think you salvage procedure is correct and quite fair.

As for the NMFC 61183 issue, the classification of the material is determined by what is initially shipped. In other words, it is either NMFC 61150 or 61183 at the time it is shipped, and does not change at some later time when the damaged reel/coil is being salvaged.

If in the course of salvaging material that was properly shipped as NMFC 61150, it is found that there is some undamaged material, but that the length is not saleable and thus has no commercial value other than scrap, this would not affect the classification.

212) FREIGHT CLAIMS – CLEAN DELIVERY RECEIPT DESPITE ACCIDENT

Question: After an accident the carrier (verbally) admitted liability for damage to parts shipped to an automotive dealership. As per its corporate rules, the dealership accepted delivery of the parts but did not note the damage at the time of the delivery because the carrier admitted liability for the shipment. The carrier now claims that since the damage was not noted on the paperwork, they are not liable to the dealer. If there is an accident, what kind of documentation has to be filed that I could access to use to show liability on the part of the carrier?

Answer: The fact that the damage was not noted on the delivery receipt does not relieve the carrier from liability. However, the claimant does have the burden of proving that the shipment was damaged at the time of delivery. I would suggest that you obtain a detailed written statement from a receiving person who has personal knowledge of the facts, and re-submit the claim to the carrier.

213) FREIGHT CLAIMS - CLEAR DELIVERY RECEIPT

Question: Our bill of lading clearly states “Any loss or damage must be noted at time of delivery otherwise consignee’s signature will constitute clear receipt”. Even though our customer has signed and dated this delivery in the corresponding areas, they also noted on the bottom of the bill “Subject to receiver’s count”. Subsequently their accounting department has now underpaid us for a substantial amount of product that they say was not delivered on the bill, even though all products were listed and signed for. We are now dealing with a person in their

accounting department that does not understand transportation law, and I was wondering how in your words we can make them understand their liability, when their receiver signs a bill of lading.

Answer: First, it must be understood that whether or not there may be a shortage at the time of delivery is basically a question of fact. Statements on your bill of lading or on the delivery receipt, at best, give rise to a rebuttable presumption of what was or was not actually delivered.

The claimant has a basic burden of proof: that the goods were tendered to the carrier at origin and that they either did not arrive (shortage) or were damaged at the time of delivery.

Each situation has to be adequately investigated and should be resolved on the merits.

These subjects are covered in detail in *Freight Claims in Plain English* (3rd ed. 1995) which is available from the Council.

214) FREIGHT CLAIMS – CLEAR DELIVERY RECEIPT

Question: We were the delivering carrier of an ice machine, which the consignee accepted without any exceptions. The consignee called the same day saying that there was concealed damage to the machine. The consignee says the machine works but the shipper will not warranty the product if there is damage to the machine.

I transmitted the claim to the advanced carrier (there was at least two) and they are declining the claim based on a clear delivery receipt. I understand that it is the responsibility of the claimant to prove carrier liability based on a clear delivery receipt, but I had an inspection performed and pictures taken with a Polaroid.

We noted an exception at the time of interchange, so it is not our liability. Should the inspection report and the pictures be enough to prove carrier liability?

Answer: A clear delivery receipt establishes a rebuttable presumption of delivery in good order and condition. In order to get around the presumption, you need to establish that the loss/damage did not occur after delivery.

Your inspection report, pictures, etc. are certainly helpful in establishing the unit was damaged, but they don't necessarily show that the damage was there at the time of delivery. You should also get a detailed statement from the consignee explaining how the unit was handled after it was delivered, how and where the damage was discovered, and establishing clearly that the damage could not have occurred after delivery.

215) FREIGHT CLAIMS – CONCEALED DAMAGE

Question: On July 1st, I ordered a large TV set online from an online vendor. The purchase was charged to a credit card. I received an email invoice on the same day with instructions regarding shipment tracking on the carrier's website and checking for damage when the TV arrived.

On July 13th, a check of the carrier's website indicated that the item had not been picked up. I then called the vendor and cancelled the order. I received a cancellation number from the vendor.

On Friday, July 16th, a large box was delivered by a trucker who claimed that he had made two previous attempts to deliver. The box was totally enclosed in a heavy black plastic sheath with shipping documents taped to it, which included a notice to check for damage. In view of the notice, the person receiving the box hesitated to sign, but was assured by the driver that she was only acknowledging delivery of the box. As a result she signed a delivery receipt that included the acknowledgement that she received the "shipment in good order and condition".

On Saturday July 17th I returned from a business trip and cut open the black plastic sheath and noted that the cardboard box beneath had been damaged. The top of the box was pushed in and a side of the box had been split.

On Monday July 19th I called the vendor to request instructions and was told it was ok to inspect the TV to see if it was actually damaged. Upon inspection I discovered the frame of the TV screen had been bowed by some force from above. I called the vendor again and reported the damage. I was told to send an email explaining the incident.

Through a series of emails I sent pictures of the damaged box and its TV contents and requested a replacement. The vendor finally asserted that since a receipt had been signed, they would pay 1/3, the carrier would pay 1/3 and that we would have to pay 1/3. I rejected this offer.

Upon a more detailed examination of the box, it appeared that the black plastic sheath had been put on the box after it was damaged. When the plastic was removed, a tip indicator was found on the side of the carton showing that the box had been tipped. The shipping documents which had been taped to the outer black plastic sheet when delivered, bore on their back when removed from the plastic, a piece of the top of the cardboard carton which perfectly matched a section of the carton having a layer of cardboard missing.

So the evidence is fairly compelling that someone overtly concealed the damage by encasing the carton in the black plastic covering.

Would appreciate your suggestions.

Answer: You have a classic case of what is called “concealed damage”.

Signing a “clear” delivery receipt only creates a rebuttable presumption that a shipment has been delivered in good order and condition. Regardless of whether the damage was noted at the time of delivery or discovered a few days later, the shipper still as the same 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.

Assuming that the TV set was in good order and condition when it was shipped, the consignee would have the burden to establish, with competent evidence, that the loss or damage did in fact exist at the time of delivery and did not occur some time after delivery. From the facts as you have described them, this burden can be met, and the carrier should be liable.

I note that the carrier has offered 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.

Unfortunately you have limited remedies when a carrier refuses to pay a claim. There is no government agency to turn to, and your only recourse may be to file a lawsuit or, if the carrier agrees, submit the claim to arbitration.

216) FREIGHT CLAIMS – CONCEALED DAMAGE

Question: We are a truckload broker. I contracted a carrier to take a truckload of electronics from TX to VA. When the load arrived and was being unloaded the consignee refused one piece (51” big screen TV) due to hearing broken glass in the box. This was noted on the bill of lading along with the seal being intact. The carrier took the damaged box to its facility. We were contacted the next business day (by the carrier) about the damage. The carrier’s dispatcher, with whom I booked the load, told me that the television was still in the box and was never opened. However, when they got it back to their dock, which is in a different location than where the dispatcher is, the carrier’s dock men opened the box. What they found

was that this television was in many pieces. The carrier did send pictures. I have reviewed the matter with the shipper and they feel that this was done in transit.

The carrier feels that the damage occurred when it was loaded and has denied the claim on the basis that their driver did not load and was not present at the time of loading and the televisions were boxed making it impossible for him to check for damages. This was not a dropped trailer. The driver is allowed and encouraged to watch the loading of his trailer. The driver did sign the bill of lading as well as an invoice at the shipper location for the number of pieces. Do you have any advice? Should I pay the carrier before this is settled?

Answer: You have a classic case of what is called “concealed damage”.

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 at the time of delivery. These are factual questions that depend on the specific situations of each shipment.

The fact that the driver signed the bill of lading is not conclusive evidence that the TV could not have been damaged when it was tendered to the carrier. This is clear from the language of the bill of lading that says the goods are received by the carrier “in apparent good order, except as noted (contents and condition of contents of packages unknown)...”

Since it appears from your description of the facts that the carrier acknowledges that the TV was damaged at the time of delivery, the question was whether the TV was in good order and condition when it was tendered to the carrier.

I would suggest that you obtain written statements from the persons having actual knowledge of the condition of the TV before it was loaded, and describing how it was loaded into the carrier's trailer, in order to show that the damage could not have been a pre-existing condition. Submit this information to the carrier and request reconsideration of your claim.

As to your second question, it is not illegal to withhold payment of the freight charges as a setoff against a cargo claim. However, you should be aware that the carrier may have late payment penalties in its tariff.

217) FREIGHT CLAIMS – CONCEALED DAMAGE

Question: I shipped a $6,000 item California to Florida. The crate looked fine when delivered. The builder of the house I’m constructing advised me that it would be safer to leave the contents in the crate unopened for several weeks (turned out to be 6 weeks), than to open it immediately and install the item (an etched glass window). He reasoned that there was some risk associated with installing it and then having one of the other subcontractors carrying things in and out accidentally damaging the window.

When the crate was opened 6 weeks later, the builder discovered the concealed damage (broken and in pieces). It’s a total loss.

Upon contacting the carrier, we were informed that their general policy was to decline claims for concealed damage that are received more than 15 days after a clear delivery.

Despite a detailed letter outlining the care taken to assure no possibility of breakage before and after transport, and the sensible reasoning behind the delay in opening the crate, and three calls, they held firm to their declination.

In looking over all the documentation associated with the transport, and their website, it all says we have nine (9) months to file a claim. Nowhere is there a statement with respect to the apparently secret and arbitrary policy of 15 days. The receiving form does have a statement on the back advising to open the crate immediately, but does not say that it has to be done within 15 days or a claim will be declined.

The carrier also indicated that even if we had opened the crate within their policy timeframe, they would have only been willing to offer 1/3 value as a settlement. I saw the website Q&A

item wherein you stated that there is no legal basis for the 1/3 offer, and if they broke it they should pay in full.

Questions --

1) What do you advise me to do to get full restitution for the money I'm out?

2) Is there a (federal/and or state) regulatory agency empowered to instruct the carrier to make good on their destruction of my etched window?

3) If I have to file a lawsuit to get reimbursed, how do I go about it, and can you recommend which state to file in (CA, FL, carrier home state), and can you recommend a lawyer in the appropriate locale (or how to find one)?

4) Assuming this gets settled satisfactorily, is there a way to ship a replacement etched window cross country such that any breakage is fully insured (e.g., "no fault"). I'd be willing to pay a reasonable premium for such insurance.

Answer: The mere fact that damage may have been "concealed" is not a defense for a carrier if there is proof that the damage existed at the time of delivery. "Concealed damage" refers to damage that is not apparent at the time a shipment is delivered. 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.

As to a policy of declining claims reported more than 15 days after a clear delivery, I would note that Item 300135 of the National Motor Freight Classification deals with "Reporting Concealed Damage" and states in relevant part:

> If more than fifteen days pass between the 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 the loss or damage was not incurred by the consignee after delivery of shipment by carrier.

This does NOT mean that a carrier is not liable if the damage is reported after the 15 day period. 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.

As to your specific questions:

1) What do you advise me to do to get full restitution for the money I'm out?

If the carrier refuses to pay your claim, depending on the jurisdictional limits of your local small claims court, you may be able to handle this yourself. Otherwise you may need to retain an attorney to take legal action.

2) Is there a (federal/and or state) regulatory agency empowered to instruct Roadway to make good on their destruction of my etched window?

No. At one time the Interstate Commerce Commission ("ICC") would put pressure on carriers that violated its claim regulations and/or refused to pay legitimate claims. However, the successor to the ICC, the Federal Motor Carrier Safety Administration does not provide any such service or support to shippers.

3) If I have to file a lawsuit to get reimbursed, how do I go about it, and can you recommend which state to file in (CA, FL, Roadway home state), and can you recommend a lawyer in the appropriate locale (or how to find one)?

As noted above, you may be able to file a complaint in your local small claims court, or you may need to retain an attorney. You can bring suit at the origin, the destination, or where the carrier has its principal place of business. If you need a reference to a transportation attorney in your area, give us a call.

4) Assuming this gets settled satisfactorily, is there a way to ship a replacement etched window cross country such that any breakage is fully insured (e.g., “no fault”). I'd be willing to pay a reasonable premium for such insurance.

A motor common carrier is liable for the full actual loss (usually the invoice price or the destination market value), UNLESS it has a limitation of liability in its bill of lading, or one that is incorporated by reference in the National Motor Freight Classification or an applicable rules tariff. Most large LTL (less-than-truckload) carriers, have a general limitation of $25 per pound (although many are less), or a specific limitation that is applicable to the commodity being shipped. I am not aware of a liability limitation that would apply to “etched glass windows”.

You must request a copy of the tariff in advance of shipping in order to find out if there is a liability limitation or “released rate” that is applicable to your commodity. Carriers generally will not voluntarily tell you this unless you ask. Motor common carriers do not offer “insurance”, but you may be able to declare a value and pay an additional charge (excess valuation charge) that is usually between $.50-.75 per $100 of excess value.

As to the 1/3 offer, you are correct: there is no legal basis for such a compromise offer. Either the carrier is liable for the damage or it is not.

218) FREIGHT CLAIMS – CONCEALED DAMAGE

Question: I have a question about the law in regards to concealed damage delivered by common carriers. Where in the law does it state that a clear delivery receipt creates a rebuttable presumption that the shipment was in good order and condition at the time of delivery? Is this federal law?

Also, where in the law is the burden of proof stated?

Answer: There is no specific statute or regulation that deals with “concealed damage”. The applicable legal principles are found in numerous federal and state court decisions over the years.

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 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.

The mere fact that damage may have been “concealed” is not a defense for a carrier if there is proof that the damage existed at the time of delivery.

“Concealed damage” refers to damage that is not apparent at the time a shipment is delivered. 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.

If you can provide a 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), the carrier should pay the claim.

219) FREIGHT CLAIMS - CONCEALED DAMAGE

Question: A trucking company picks up an LTL load. They take it to their warehouse, break it down and then reconsign (broker) it to another carrier because they do not service the delivery area. By the time it reaches our customer, they open the merchandise to inspect, it is found

damaged and so they refuse the piece. The carrier said they will not pay for the item although they signed for it in good order because it considered the damage concealed.

Can the carrier claim concealed damage?

Answer: 1. If the origin carrier that picked up the shipment issued a through bill of lading, it is liable for any loss or damage even though it may have interlined the shipment to another carrier for final delivery.

2. "Concealed damage" refers to damage that is not apparent at the time a shipment is delivered. If damage is not found until after delivery, and not noted on the delivery receipt, then the shipper 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. In other words, the mere fact that damage may have been "concealed" is not a defense for a carrier if there is proof that the damage existed at the time of delivery.

220) FREIGHT CLAIMS – CONCEALED DAMAGE

Question: I filed a claim for concealed damage. Our customer signed for the delivery clear and then discovered the damage. The consignee notified the carrier and us eight days after delivery. The shipment was still in its packaging. There were two holes in the packaging, one 4-5 inches long, and the damage to the product corresponded to the packaging.

The carrier inspected the damage. The carrier has declined the claim based on the clear delivery receipt, and asserts that if the damaged packaging was visible at time of delivery it would have been noted.

How can I refute this?

Answer: Obviously there is a factual dispute as to whether the damage existed at the time of delivery or occurred in the consignee's facility.

I would suggest that you obtain a written statement or affidavit from the consignee that details the handling of the shipment after it was delivered so as to eliminate the possibility that the damage occurred after delivery. The statement should be factual, and by a person having actual knowledge of the facts.

Submit this to the carrier and request that they reconsider their declination of the claim.

221) FREIGHT CLAIMS – CONCEALED DAMAGE

Question: We are a truckload broker. I contracted a carrier to take a truckload of electronics from TX to VA. When the load arrived and was being unloaded the consignee refused one piece (51" big screen TV) due to hearing broken glass in the box. This was noted on the bill of lading along with the seal being intact. The carrier took the damaged box to its facility. We were contacted the next business day (by the carrier) about the damage. The carrier's dispatcher, with whom I booked the load, told me that the television was still in the box and was never opened. However, when they got it back to their dock, which is in a different location than where the dispatcher is, the carrier's dock men opened the box. What they found was that this television was in many pieces. The carrier did send pictures. I have reviewed the matter with the shipper and they feel that this was done in transit.

The carrier feels that the damage occurred when it was loaded and has denied the claim on the basis that their driver did not load and was not present at the time of loading and the televisions were boxed making it impossible for him to check for damages. This was not a dropped trailer. The driver is allowed and encouraged to watch the loading of his trailer. The

driver did sign the bill of lading as well as an invoice at the shipper location for the number of pieces. Do you have any advice? Should I pay the carrier before this is settled?

Answer: You have a classic case of what is called "concealed damage".

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 at the time of delivery. These are factual questions that depend on the specific situations of each shipment.

The fact that the driver signed the bill of lading is not conclusive evidence that the TV could not have been damaged when it was tendered to the carrier. This is clear from the language of the bill of lading that says the goods are received by the carrier "in apparent good order, except as noted (contents and condition of contents of packages unknown)..."

Since it appears from your description of the facts that the carrier acknowledges that the TV was damaged at the time of delivery, the question was whether the TV was in good order and condition when it was tendered to the carrier.

I would suggest that you obtain written statements from the persons having actual knowledge of the condition of the TV before it was loaded, and describing how it was loaded into the carrier's trailer, in order to show that the damage could not have been a pre-existing condition. Submit this information to the carrier and request reconsideration of your claim.

As to your second question, it is not illegal to withhold payment of the freight charges as a setoff against a cargo claim. However, you should be aware that the carrier may have late payment penalties in its tariff.

222) FREIGHT CLAIMS – CONCEALED DAMAGES

Question: I am an Account Manager with a logistics company out in Kansas and represent them in the metro St. Louis area. We have a client here that participates in our Freight Management Program. We have negotiated pricing on their behalf, established contracts between this client and their carriers, and provide numerous other services relating to their inbound and outbound transportation needs.

They recently purchased a new $15,520 labeling machine from a vendor in Southern California. Weighing 700 lbs., the machine was completely crated. An outline of pertinent information follows:

The machine, which was to go into immediate production once it was delivered, was in an "all short - bill/no freight" status for a number of days and ultimately delivered well beyond the expected delivery date. Unaware of any damage at delivery the crate was accepted and signed for without any noted exceptions.

Warehousemen began uncrating the machine and discovered a cross brace/support had broken under the bowing of the slatted wood top panel. The broken brace in turn impacted a component of the machine.

Within 30 minutes of the driver's departure, the local terminal was notified of the concealed damage. Our client was advised that an inspection service would be contacted to assess and document the damages.

The machine remained untouched and the inspection service documented specifics concerning markings, packaging and materials, etc. The report noted that the "top of the crate has a cracked area and visible hole … removing the top panel of crate shows that top crossing slat was crushed downward and broken ... top of the machine is visibly impacted along the same area. The head unit along the damaged area is crimped, bent, and out of alignment." The noted "visible hole" is the size of a large coin and resembles a knot in the lumber used to construct the crate.

A claim was filed for the cost of the machine and later revised for the cost of replacing the damaged component. This reduced the original $15,520 claim to $6,143.

The carrier contends the damage was concealed. As there were no notations on the delivery receipt, the carrier has offered 1/3 of the mitigated amount or approximately $2,050.

Given the damages were identified and reported with 30 minutes of the delivery, is there a justified basis for the concealed damage settlement offer? The contract we have in place between this client and carriers allows for arbitration if necessary although it is an option we prefer to avoid.

Is there is any legal basis for the 1/3 settlement offered by the carrier? Can this can be construed as a "goodwill gesture" (their term, not mine) or initial settlement offer?

Answer: Whether or not the damage was "concealed" only creates an evidentiary issue as to where the damage occurred. Under the circumstances you describe, it is apparent that the damage occurred in transit and not after delivery by the carrier. (It sounds as though the carrier top-loaded other freight on the crate.)

Unless there is some reason to believe that the damage occurred either before tender to the carrier (at the shipper's facility) or after delivery (at the consignee's facility), the carrier should pay the claim in full.

If damage is not noted on the delivery receipt at the time of delivery, the claimant has a greater burden, namely to show that the damage did not occur after delivery. In other words, the clear delivery receipt creates a rebuttable presumption that the shipment was in good order and condition at the time of delivery.

There is no legal basis for the 1/3 settlement offer. The carrier either is liable or it is not liable. The only justification for a compromise settlement is when it is uncertain where the loss occurred, or, in disputed cases, the potential expense of litigation.

The claimant always has the basic burden of proof: that the shipment was in good order and condition when tendered to the carrier at origin, and that the shipment was damaged at the time of delivery. See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 5.0, Burdens of Proof.

223) FREIGHT CLAIMS – CONCEALED DAMAGES

Question: I am the Office Administrator for a material handling equipment distributor. I recently purchased a modular office for one of our clients. It was manufactured in Hialeah Florida (just outside Miami) and delivered to Cold Springs, Minnesota. There were 13 pieces with a total weight of 5,393 lbs. It was delivered and signed for at our client's facility in Cold Springs. The warehouse men immediately began uncrating all the boxes, as they needed to assemble the office right away.

When they opened the box containing the HVAC unit they found it damaged (the front panel had come off and was crushed). They called me as the driver had already left about 15 minutes before they made the discovery. I called the carrier and reported the damage. They sent out their Branch Manager to make an inspection and assess the claim. He concluded that it was concealed damage and that the unit would need to be replaced (it was not repairable). He sent me a copy of his report along with the pictures he took and had me fill out the standard form for presentation of loss and damage claims.

We ordered a replacement unit, and sent all the paperwork to the carrier. They delivered the replacement unit. A month after receiving the claim the carrier sent a letter stating that the "burden of proof rests with the claimant to prove that the damage was carrier caused" and that we "did not provide them with documented evidence that establishes carrier liability." They were left with "no alternative" but to deny our claim. I wrote back immediately upon receipt of this letter. I informed them that we did everything we were required to do to provide them with the proof of "carrier liability."

It is clearly stated on the Branch Manager's inspection form that it was concealed damage and that there was a "crushing of one of the corners of the box that was consistent with the damage." He took pictures of the box and the damaged unit and even went so far as to state that the box had not been moved from its point of delivery. Five days after getting my letter he sent me a check for 1/3 of the cost of the replacement unit. Written on the check stub is the following:

Federal claim rules published in Administrative Ruling 120 prohibit carriers from paying claims unless there is conclusive evidence of carrier liability. This ruling does, however, permit carriers to make voluntary compromise settlements in cases of concealed damage where, while there is no evidence of carrier liability, the carrier feels that as one of the parties who handled the goods, it could have contributed to the damage. In accordance with this ruling, we have enclosed a check (for 1/3 the cost) as a voluntary settlement of your claim. We believe you will find this to be fair and reasonable settlement in view of these circumstances. In the absence of evidence of carrier liability, we have no alternative but to decline the balance. Please know that your claim was carefully reviewed-our goal is always a fair and legal outcome.

What more can I do to "conclusively prove" carrier liability? I don't feel that we should have to pay 2/3 of the cost of the replacement unit when it was clearly damaged in shipment and therefore not our responsibility. Do we have to accept this settlement or is there a way that we can recover our loss as we had to pay for the replacement unit already in full?

Answer: Regardless of whether the damage was noted at the time of delivery or discovered a few minutes later, the shipper still has the same 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.

What this means in your situation is that you will have to get some competent evidence that the unit was not damaged when the shipper tendered it to the carrier at origin, and that it could not have been damaged by the consignee after it was delivered. This is normally done with a written statement or affidavit from someone who has actual knowledge of the facts. These statements or affidavits should be presented to the carrier in order to establish that the loss did in fact occur during transit.

As an additional comment, I would note that the carrier's processing of loss and damage claims is governed by FMCSA (formerly ICC) regulations at 49 CFR Part 370. The carrier's references to "Administrative Ruling 120" are incorrect.

224) Freight Claims – Consignee Repeatedly Asserting Shortages

Question: My logistics customer is a large electronics manufacturer. They ship to very large retail stores. On an LTL shipment the truck is loaded at the warehouse with the driver present. The material is taken to a breakpoint then delivered to the retailer. No shortages are noted.

At the consignee the driver is not allowed on the dock as the truck is unloaded. He is later given a scan sheet that notated shortages. The driver signed the scan sheet.

The carrier denies the claim on the basis that his driver could not witness the unloading. The retailer refuses to cooperate with any investigation.

What approach would you take when working claims such as these?

Answer: This seems to be a fairly common problem when dealing with these large retail stores. It is a factual question as to whether there really was a shortage, and whether the shortage occurred while the goods were in the possession of the carrier. Apparently the carrier suspects that the shipments were actually delivered, and that the loss occurred after delivery at the consignee's facility.

Some suggestions:

1. Include specific provisions in your transportation agreement with the carrier that cover this situation.

2. If this is a recurring problem with certain consignees or locations, report it to the consignee's security department and ask them to investigate. You may also suggest to the carrier that it should conduct an investigation.

3. If theft is suspected, report it to the local police.

225) FREIGHT CLAIMS – CONTAMINATED FOODSTUFFS

Question: We are a 3rd party shipper of food ingredients. These ingredients are packaged in multi-wall paper bags & palletized 50 bags per pallet. Our customer sent a truck into the manufacturer for loading. The product was sold FOB shipping plant, freight collect. The customer rejected the load upon delivery. They state that the trailer walls were dirty & that the trailer had an offensive odor in it. They further stated that the shipper should not have loaded this trailer due to its poor condition. The shipper says the trailer was suitable for loading. We, as the seller, are in the middle of this battle of he says-she says.

The trailer returned to the shipper for evaluation. The shipper agreed to take back the product but would not take responsibility for any of the freight costs. Upon returning, the shipper inspected the trailer and found no offensive odor and insisted the trailer walls were not dirty. Our customer wants reimbursement for the freight charges for the shipment to and from the shipper. The shipper insists there is nothing wrong with the trailer.

Our stance is that the shipper loaded a suitable trailer (one sent in by the customer), the load was shipped FOB plant, freight collect, and that the customer needs to address this issue with their carrier in the form of a freight claim.

What is your take on this situation? What are the legal issues here? Which party has the liability & risk in this instance?

Answer: This sounds like a law school exam question, but let me try to analyze it.

1. You purchased the goods from the manufacturer and took delivery at the manufacturer's plant. You then resold the goods to your customer, and the terms of your sale were "FOB" the manufacturer's plant. Under the Uniform Commercial Code, the risk of loss in transit passed to your customer at the time the goods were tendered to the motor carrier, see "Freight Claims in Plain English" (3rd ed. 1995) at Section 10.19. Thus, if there was any loss or damage to the goods, the customer/consignee would be the proper party to file a claim against the carrier.

2. A motor carrier is required to furnish "safe and adequate service, equipment and facilities...", 49 USC 14101. This requirement has been construed to mean clean and suitable trailers, etc. for the type of commodity being shipped. Obviously, food ingredients or products need a higher standard of care than other general commodities. Thus, if the trailer was dirty or there was odiferous material that could contaminate the product, a consignee might reasonably conclude that the product was unsuitable for human consumption.

3. The product was returned and apparently was found to be undamaged. Thus, there is no claim for damage to the goods themselves. However, the cost of returning the goods to the shipper for inspection, testing, etc. could be considered a reasonable expense incurred to mitigate the damages. If so, the carrier could be liable for these freight charges. As to the original outbound freight charges, there is a question whether these would be recoverable since the delivery was completed, and there ultimately was found to be no damage to the goods.

226) FREIGHT CLAIMS – COST OF INSPECTION AS MITIGATION OF DAMAGES

Question: We have a carrier that dropped a Water Chiller off of their trailer. There was no apparent exterior damage to the unit. The consignee advised that there was no assurance that there was no internal damage and disassembled the unit to make sure no internal damage occurred.

They spent $26,000 in doing this. They found no damages, and are expecting to be reimbursed for this. Does the carrier owe for these damages?

Answer: As a general rule, there is a duty to "mitigate damages". This usually means that damaged items should be inspected, tested, repaired, etc. if it is reasonable under the circumstances to do so.

The question here is whether these expenses were "reasonable" under the circumstance. This is a factual question and would depend on the value of the unit, the potential risks such as personal injury, fire or other damage if it were to be installed and failed during operation, etc.

If there is adequate justification for the expenses incurred by the consignee, and the expenses are "reasonable" when compared to the value of the unit, I would think the carrier should be liable.

The subject of "mitigation of loss" is covered in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.1.4.

227) FREIGHT CLAIMS – COSTS ASSOCIATED WITH LOST SHIPMENT

Question: Our F350 truck transmission died. We had a transmission place put in a rebuilt one, that they had to get from a rebuilder in another city. It came with a warrantee.

The mechanic who put in the rebuilt transmission told my husband it made too much noise, and he would be happier if he took it out and replaced it with another rebuilt. The rebuilders didn't have another one. So the mechanic sent our "new" one by freight back to be re-rebuilt.

It never arrived. The freight company doesn't know where it is, according to the mechanic, who has a tracking number. The freight company acknowledge picking it up. The rebuilders never got it.

The freight company won't talk to us, says, "we aren't their customers". The mechanic can do nothing about it, the rebuilders don't have it, and meanwhile we are on our second week of renting a car. My husband works out of town all week, and this is where the tranny died, 250 miles away, so he had to rent a car.

What can we do at this point?

We just put $3500 cash into the truck, for the tranny, transfer case, and clutch. We don't have $ to buy another rebuilt one (almost $2000).

If we are forced to keep waiting for the freight company to find it, or admit they lost it, can we force them to buy another tranny AND pay for the rental car?

How soon would be reasonable to ask them to do so?

Is this all going to take months to resolve, by taking them to small claims court?

Or would we be wiser to go to an attorney right away?

Thanks!

Answer: You do have a claim for the missing transmission against the trucking company, and it should be filed (IN WRITING) promptly. Since your mechanic was presumably shown as the "shipper" on the carrier's bill of lading, the claim should indicate both names. The carrier must respond to the claim, and from what you have indicated, should be liable for the value of the transmission. Most likely, the carrier would not be liable for your extra expenses (car rental, etc.) as these would be considered "special damages" that would not be foreseeable.

This may not resolve your immediate problem, but at least you would be reimbursed for the value of the lost transmission.

228) FREIGHT CLAIMS - CUSTOMER DELAY AFTER TEMPERATURE VIOLATIONS

Question: Our customer shipped 14 cases of dry curd to someone on a bill of lading our customer created. The bill of lading clearly stated that the "Transportation Temp. needs to be kept between 33 - 38 degrees F."

When the product arrived at the destination it was probed to be 44 degrees and the product was refused. Upon refusal we asked our customer what to do with the product to which we didn't get a response. The product went back to the carrier's warehouse and sat in storage awaiting further information. In the meantime we found that the consignee did not probe the actual product, but rather just the trailer temperature, so it is unknown whether the product was in good condition or not. We explained the situation to the customer and they requested the product be returned to them so they could inspect it.

Upon return and inspection it was found that the product temperature was within normal spec levels and could have still been good. However, due to the nature of the product, it was now at the end of its shelf life (28 days) and the product had to be destroyed.

I am unsure if the customer has a claim against the carrier based solely on the fact that the temperature of the trailer was too high. Had the product been tested immediately they could have mitigated the loss, but unfortunately due to this error on the receiving end and the delay in the customer's response on the disposition of the product, it ended up in a total loss of because the shelf life had expired.

Answer: From your description of the facts, the product was actually in good order and condition, and at the proper temperature, at the time it was initially delivered. In my opinion, the fact that the air temperature in the trailer was a few degrees higher did not justify rejection of the entire shipment, and the consignee should have probed or tested the temperature of the product itself.

Likewise, the carrier cannot be held liable for the subsequent delay while the product was in storage.

The carrier could only have liability as a warehouseman if it was negligent, and its negligence caused the loss. I cannot see how the expiration of the product shelf life would have been caused by the carrier's negligence.

229) FREIGHT CLAIMS – DAMAGE NOTATIONS

Question: One of our branches received a large shipment. When the door was opened, cargo other than ours, came loose, rolled around inside the truck and damaged our shipment. We annotated the damage to the units, however, we did not annotate that the damage was done by loose cargo. The damage is valued at almost $7,000.00. The carrier denied the claim saying the vendor did not package the material correctly. I contacted the vendor, this carrier has been delivering their product for years, and the packaging hasn't changed. I disputed the denial, stating this fact and that the damage was done by other cargo, however, the carrier stands by their initial denial.

Answer: The carrier is liable for the damage to your goods, unless it can prove that the cause of the damage was improper or inadequate packaging AND that it was free from any negligence. The burden of proof is on the carrier; see *Freight Claims in Plain English* (3rd ed. 1995) at Section 5.0.

Under the circumstances you have described, it sounds as though the other cargo was not properly stowed or braced in the truck. This would be the responsibility of the carrier, i.e., negligence.

You should re-submit your claim and demand payment.

230) FREIGHT CLAIMS – DAMAGE TO NON-CONFORMING GOODS

Question: A truckload of latex paint (non hazmat) arrived in Tennessee from California with product dripping out the back of the trailer. We are a wholesaler, bought the paint sight unseen, but were told the paint was in good condition when we purchased it.

The origin loaded half the truck, then gave the driver instructions on what to load and allowed the driver to finish loading himself. Driver did not note any grievance with the product upon loading.

When the load arrived in Tennessee with paint dripping out of the trailer, our customer refused the entire load. Inspection showed that rusty gallon cans had been stacked on quart cans, shrink wrapped and then palletized. The load shifted enroute, and the mere weight of the larger rusty cans on smaller rusty cans created havoc. Some of the load may be salvageable, but our customer wanted no portion of it, as it was not as we had represented it. (We represented it as seconds in paint, not rusty trash)

We have received our monies back for the product and are trying to resolve the issue with (and for) the carrier. However, as we no longer own the product, to whom does the carrier go for 1) freight charges; 2) detention charges; 3) authorization to dispose of the product; and 4) disposal charges?

The original seller is trying to blame carrier and file a freight claim for damages. In this instance, is this a freight claim?

Answer: There are a number of issues presented.

First, it would appear that your vendor not only sold you distressed goods, but did not prepare the goods for shipment or load them properly. Unless there is some indication of carrier negligence in handling this shipment, I would conclude that the damage was due to an “act or default of the shipper” and that the carrier would not be liable.

As to the question – “... to whom does the carrier go for 1) freight charges, 2) detention charges...” - the answer really depends on the contract of carriage, which would ordinarily be represented by a bill of lading. Thus, if your vendor was the shipper on the bill of lading, it would be presumed that the vendor/shipper would be liable for the carrier’s freight charges, as well as any detention charges.

The question relating to – “3) authorization to dispose of the product, 4) disposal charges...” is more difficult. Usually, if the goods were sold “FOB Origin”, your company would be presumed to be the owner once the vendor places the goods on the carrier’s truck, and under the Uniform Commercial Code you would have risk of loss in transit. However, I would think that since the goods were non-conforming, and were improperly prepared and loaded for transportation, the vendor/shipper would still be considered the owner, and thus responsible for them.

Obviously, something must be done to dispose of the damaged material. However, you should first make written demand on the vendor/shipper to take responsibility for this.

If your vendor does not ultimately agree to pay or reimburse for the freight charges, detention and clean-up costs, you may have to take legal action. I would suggest that you consult with your legal counsel.

231) FREIGHT CLAIMS – DAMAGED FOOD PRODUCT

Question: I have a claim involving multiple food items. The shipper QA'd the product and deemed the product unfit and destroyed the product prior to the carrier's inspection. However, the carrier was made aware of the exception at POD.

What law supports the claimant in this instance where a food product is deemed unsafe for any market and, as well, the claimant's name is on each product and case?

Answer: As a general rule, if there is any legitimate question about the condition or safety of a food product, most courts would agree that it should be destroyed. See, e.g., *Swift-Eckrich, Inc. v. Advantage Systems, Inc.*, 55 F.Supp.2d 1280 (D.Kan. 1999).

The specific law that would be applicable to your situation is the Federal Food, Drug and Cosmetic Act. The following is a quote from section 11.5 of "Freight Claims in Plain English" (3rd Ed. 1995), which deals with this subject:

> 11.5 CONTAMINATED SHIPMENTS
>
> The question of whether or not a shipment is damaged at the time of tender of delivery to the consignee is one of fact. With respect to edible products, this question is frequently answered by federal regulations which mandate the destruction of contaminated goods subject to those regulations.
>
> In *Pillsbury Co. v. Illinois Cent. Gulf R.R.*, 687 F.2d 241 (8th Cir. 1982), there were foreign grain beetles in the railroad cars upon arrival at destination, but there were no beetles in the bags of flour. The carrier railroad argued that, since there was no damage to the flour itself, the railroad is not liable. The court rejected this argument since the flour was made unfit for human consumption by being held under insanitary conditions whereby it may have become contaminated. As a matter of federal law, the goods were damaged.
>
> The necessity of ensuring that rail cars loaded with bulk flour reach their destination in a pristine condition is mandated by federal law. Under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 321, et. seq., processors and distributors of foodstuffs intended for human consumption are held to very strict sanitary standards to ensure the safety and purity of their products.
>
> The standard to be applied in cases of this kind is set forth in Section 402 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 342(a)(4), Appendix 48, which states:
>
> 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 in filth, or where by it may have been rendered injurious to health. . . "(emphasis added)
>
> The law is clear. If a food product has been held under insanitary conditions and thereby may have been subjected to contamination, or otherwise rendered injurious to health, it is adulterated for purposes of the Act. United States v. Nova Scotia Food Products Corp., 417 F.Supp. 1364 (E.D. N.Y. 1976); United States v. 1,200 Cans, Pasteurized Whole Eggs, 339 F.Supp. 131 (N.D. Ga. 1972). It should be noted that in Pillsbury, the court did not award as damages the total value of the adulterated flour, only the fumigation charges incurred to render the flour unadulterated.

232) FREIGHT CLAIMS – DAMAGED FOOD PRODUCTS

Question: My foodservice distributor contracted with a carrier to pick up a frozen load at one of my supplier locations. In route to the distribution center ("DC"), the driver of the load was arrested for drug possession and the truck and trailer impounded. Officials from the DEA inspected the truck and the trailer. They did find evidence of drugs in the truck, but no evidence

was found in the trailer. The truck was towed to a local frozen carrier's location where it was locked in the yard. The following day, that carrier notified my distributor of the incident and requested a new carrier for transloading the product and transport to the DC. At the impound lot, additional fuel was added to ensure the refrigeration unit was running without disruption. When the product arrived at the DC, the temperature readings of the product were within specification.

The seal on the trailer that was broken by the DEA for inspection was replaced, as well as the seal that was broken at transload. The brand has rejected the load based on the driver not maintaining control over the load at all times during transit. I think that the DEA inspection is the secondary concern. The larger concern that they have is that the facility where the transload occurred has not been qualified by the brand's Quality Assurance group.

Does my distributor have a valid claim with the carrier?

Answer: Questions about food products and broken seals 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 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.

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".

The shipper can, of course, file a claim for loss of the product, and argue that it would be an unacceptable risk to allow the product to be sold and consumed, and that it would be impossible to adequately sample and test the product to ensure that the quality had not been compromised.

However, it is likely that the carrier may decline the claim on the grounds that the shipper has a duty to mitigate the loss, and there is no actual evidence of spoilage, off-condition, contamination, or that the product is unfit for human consumption.

233) FREIGHT CLAIMS – DAMAGED HOUSEHOLD GOODS AND MISSING CARRIER

Question: We are an insurer of a motor carrier. Under a BMC 32 or BMC 82 endorsement, are household goods an exempt commodity? If not, if the carrier were out of business, would the maximum liability still be $5,000.00? We have an issue on a claim where the insured delivered the shipper's household goods and personal effects to a storage unit and basically threw the items in haphazardly, causing damages. However, the carrier is no longer in business and we have no way of locating it. We have been presented with a claim in excess of $38,000.00.

The carrier is noted under the Federal Motor Carrier Safety Administration as carrying coverage up to $5,000.00 under the policy that we are representing.

Answer: All common carriers, including household goods carriers, are required to have a BMC-32. The minimum is $5,000 for loss of or damage to property carried on any one motor vehicle; and (2) $10,000 for aggregate losses of or damages to property occurring at any one

time and place. The Federal Motor Carrier Safety Administration (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.

You can find out the name and address of the insurer that issued the BMC-32 on the FMCSA website: www.fmcsa.dot.gov and selecting the "Licensing & Insurance" menu.

It makes no difference whether the carrier is out of business, or bankrupt - that is one of the benefits of the BMC-32 for shippers.

If your company were the insurer that issued the BMC-32, then your maximum liability under the endorsement would be the $5,000 per shipment (or $10,000 for aggregate losses at any one time and place).

If there was also a cargo legal liability policy in effect at the time of the loss, you may have additional liability under the policy - subject of course to deductibles, exclusions, etc. However, this would be an indemnity-type policy so, depending on the state law, the shipper may or may not have a direct cause of action against your company as the insurer.

The only remaining question that I have based on your description of the facts is whether this loss occurred while the goods were still in transit (which would include damage during delivery, etc.) or some time after the actual transportation had stopped and the goods were being stored in warehouse. If so, the carrier's liability may have become that of a warehouseman.

234) FREIGHT CLAIMS – DAMAGED SHIPMENT LOST WHEN BEING RETURNED

Question: Our customer refused one pallet of a shipment we sent by motor carrier due to damages. The carrier asked our disposition on the refused pallet and asked what we wanted to do with the freight. Our Company decided that another motor carrier would come and pick up the refused/damaged pallet from the first carrier. The second carrier picked up the pallet and no notation as to the extent of the damage to the freight was ever documented by either carrier. While in the care of the second carrier, they COMPLETELY lost the refused pallet of our product. I first filed the claim with the second carrier. They would only agree to a partial payment on the claim amount. The second carrier said there was no documentation as to the extent of the freight damages, therefore they would not pay the full value of the product, because if it was damaged the value would have been at a lesser cost.

I then filed a claim with the first carrier for the remaining portion of the product cost. The product went out from our warehouse at full value and we should not be receiving less than full value back because of negligence by either carrier. The first carrier declined any payment on our claim, stating that the second carrier LOST the shipment and they cannot take any responsibility for them loosing our product. They state that the damage to the product that was refused was packaging only, but they cannot be responsible for that cost either because the second carrier lost the shipment.

I keep on battling back and forth from these two carriers. The second carrier has declined any further participation on issues involving this claim. They have paid all that they will pay on this. The first carrier is still not willing to take any responsibility for our losses on this shipment. Is there anything that I can do to get either freight carrier to issue us a payment on the remaining cost of this product that we have suffered a loss on?

Answer: This is a difficult situation. The problem is that you have two separate shipments - the outbound shipment to the customer, and the return shipment back to your company.

This situation is covered in *Freight Claims in Plain English* (3rd ed. 1995) at section 5.2.4. which discusses two court decisions with similar fact patterns.

The case of *S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R. Co.*, 695 F.2d 253 (7th Cir. 1982) involved a rail shipment of various household products from the manufacturer in

Wisconsin to a customer in Kentucky which sustained freezing damage en route (the 400 mile trip took 14 days). When the damage was discovered by the consignee, the manufacturer directed that the car be returned to Wisconsin for inspection and salvage. The court observed that there were actually two separate trips (outbound to customer, and return to manufacturer). Under the Carmack Amendment, L&N was the delivering carrier on the first trip, and the receiving carrier on the return trip. Even so, the court concluded that the claimant could not establish the extent of the damage to the product on the outbound trip vs. the return trip, and thus had failed to prove a necessary element of its prima facie case.

In *Rodin v. Atchison, Topeka & Santa Fe Ry. Co.*, 477 F.2d 682 (5th Cir. 1973), a shipment of potatoes from Maine to Chicago was found to be damaged on arrival at Chicago, and was then reshipped to Texas for salvage. The court observed that a new trip had begun in Chicago and that the potatoes had therefore been delivered to the defendant (ATSF) at Chicago in a damaged condition. Thus, the plaintiff could not establish a prima facie case under the Carmack Amendment.

I would think that the only way you could expect the first carrier to pay anything would be to get a definitive description of the damage and to establish the actual dollar amount of the damage that occurred on the outbound delivery (e.g., if it was only damage to the packaging, the cost of repackaging would be the measure of damages). You might need to retain an expert if it is some other kind of damage.

235) FREIGHT CLAIMS – DAMAGES CAUSED BY CUSTOMS INSPECTORS

Question: We recently incurred a damaged shipment for imported materials and filed the claim with the broker. One case had been re-taped and the other case had been cut and the inner plastic seal ruptured. This damage may have been caused by fork truck prongs that lanced the cartons. The physical damage to the contents was not serious, but the dirt found inside the cartons contaminated the components (skin cream pumps). The contents of the two cartons were rejected by our Quality Control Department and quarantined. Due to the nature of our business it is important that we maintain a high quality standard.

The broker denied the claim on the basis of "photographic evidence shows cargo was examined by the department of U.S. Customs and Border Protection". The broker stated, "they cannot accept responsibility for actions of a US Federal Entity".

Can I hold U.S. Customs accountable or am I out of luck?

Answer: If the damage was actually caused by U.S. Customs (and not by the carrier), you probably have little recourse.

The reason is that there is a body of case law to the effect that Customs is not liable for this type of damage under the Federal Tort Claims Act due to a specific statutory exemption provision, 28 U.S.C. § 2680(c), see e.g., *Locks v. Three Unidentified Customs Service Agents*, 759 F.Supp. 1131 (E.D. Pa. 1990).

I was once told that Customs sometimes will pay a small amount (up to $1000 ?) when it is clearly their fault that a shipment was damaged -- you might try writing to them with your claim.

236) FREIGHT CLAIMS – DAMAGES FOR LATE DELIVERY

Question: We had a shipment that picked up on a Tuesday for delivery on Thursday. On Wednesday the tractor broke down. The customer was notified on Thursday morning and the delivery was rescheduled for Friday. On Friday morning the tractor was still not fixed. We were able to repower the trailer late Friday and offered to deliver the product on Saturday if needed. The Customer said to deliver the product on Monday morning. They are now filing a claim for

$3,000 for delivering late, asserting they had to hire a crew to come in to unload the truck on Monday. There were no damages just a late delivery. Is this a valid claim?

Answer: A carrier is required to deliver with "reasonable dispatch", and clearly this was not done. However, the measure of damages for delay is another question. I think that the damages claimed by the consignee would probably be considered "special damages" and not recoverable.

The general rule on special damages is that the carrier must have actual or constructive notice of the need to deliver by a particular date and time, and what the consequences or damages will be if there is a delay. Thus, unless there was either (1) specific notice given at the time of the contract of carriage (receipt or bill of lading) or (2) a course of dealing or general knowledge that the consignee would have to bring in a crew to unload the truck, I would say that the claimed damages are not recoverable.

This subject is covered in detail in *Freight Claims in Plain English* (3rd ed. 1995) at Section 7.3.

237) FREIGHT CLAIMS - DAMAGES; REASONABLE DISPATCH

Question: I am somewhat confused in regards to a declination I received on a claim that I filed and was hoping you could help me better understand the declination.

Here is the claim information:

The carrier picked up a shipment from us October 15th. The transit time is supposed to be 3 days for standard ground for this shipment. The cancel date on this shipment was October 27th; the carrier was given a delivery appointment for October 29th at 6 am. The carrier missed this appointment (I was never given a specific reason as to why) and needless to say by the time the carrier delivered this shipment on November 2nd the consignee refused it because the purchase order was cancelled. The carrier never did notify us of this refusal, the consignee did. I went to the carrier to find out what happened and ultimately had the carrier return the shipment to us 'free astray'. When the shipment arrived back to us, I contacted the carrier and requested an inspection be done on the shipment because it had been through a lot of traveling and also it took a month from the date of refusal before we received the shipment back.

The inspection was conducted and the comments made by the inspector said, "7-pallets containing 126 boxes of model #33600 West Bend commercial 100 cup coffee makers with 24 visible boxes crushed, scuffed, torn and punctured. Consignee will go through the product and inspect, repackage, and salvage to the best of their ability." That is exactly what we did.

I filed a claim for the original outbound freight charges of $460.24; for the replacement carton cost for 72 cartons--$99.36; the labor cost for restocking and inspecting--$108.41 and a $10 per carton charge for restock and inspect--$1,260.00.

The declination from the carrier states: "Under the terms and conditions of the Bill of Lading Contract, the carrier does not guarantee any particular transit time or delivery date, unless the shipper and carrier have entered into a special contractual agreement for a particular shipment. The carrier obligation is to handle the shipment with "reasonable dispatch." This particular shipment delivered on 11/2/04 just 12 days beyond the standard service date. This leaves us no alternative but to decline the claimed amount for freight on your claim."

Under the terms and conditions of the Bill of Lading contract, the carrier's liability is limited to actual damages only, not to exceed the landed cost of the goods shipped. Damages claimed in excess of actual damages constitute "special damages." As special damages are not included in the carrier's contractual liability, they are not recoverable in claims against carriers. The charges for carton replacement and labor will be paid, the restock and inspection costs are considered special damages and are not recoverable.

My confusion lies with the “landed costs” he refers to, as to what he specifically means. The invoice value of each carton is $66.70 and the manufacturing cost is $31.78 per carton. I am not asking for any amount that exceeds those dollar values. Also does it seem “reasonable” to accept the delivery of this shipment “just 12 days beyond the standard service date”; especially since the carrier had a delivery appointment for October 29th?

Any clarification you could provide me on this matter would be greatly appreciated. I would also appreciate knowing if there are aspects of this claim that I filed in error. Also, is there anything in publication that I could purchase that provides definitions of legal terms used in claims other than *Freight Claims in Plain English* (which I already have)?

Answer: 1. It is apparent that this shipment was not delivered with “reasonable dispatch” and that the carrier would be liable for any reasonably foreseeable damages resulting from the delay, see e.g., *Richter v. North American Van Lines, Inc*., 110 F.Supp.2d 406 (D. Md. 2000), which involved a 7-day delay.

2. From your description of the facts, it appears that there was damage to the shipment (probably during the return to your facility). Again, the carrier is liable for loss or damage to goods while they are in its possession, regardless of whether the damage occurs on the original outbound shipment to your customer or during the return of the shipment.

3. The parties have a duty to “mitigate the damages”, and this appears to be exactly what you did.

From what I can see, the expenses that you have identified are all necessary and reasonable expenses incurred in mitigating the damage.

238) FREIGHT CLAIMS - DEDUCTIONS ON SHORT SL&C LOAD

Question: We have a vendor that is disputing a deduction we took for a less-than-truckload (“LTL”) load that arrived and was counted short. The reason we took the deduction was that the bill of lading they issue on it is printed “Shipper Load and Count” (“SL&C”). The driver signed: “1 pallet pre-shrinked STC 152 cases”.

Were we in the right to take the deduction for the shortage on a pre shrink-wrapped skid even though it shipped LTL?

Answer: The first question is whether the shortage occurred in transit (carrier's liability) or whether it occurred before shipment or after delivery.

The fact that the shipment arrived palletized and shrink-wrapped would suggest that the shortage did not occur in transit. However, this is a factual question and it is always possible that goods can be stolen or pilfered even from a shrink-wrapped pallet, or that the pallet can be broken down at some point and rewrapped. Further investigation is indicated.

Assuming that this was a transit loss, whether you can take a “deduction” for a shortage on delivery depends on which party (seller or buyer) had risk of loss in transit. If the shipment was “FOB Origin” or equivalent, the presumption would be that the buyer would have risk of loss; likewise if it was “FOB Destination” then risk of loss would be on the seller.

239) FREIGHT CLAIMS – DEFENSE OF FORCE MAJEURE

Question: Can you tell me what is meant by the term, force majeure?

Answer: An example of a definition of force majeure is:

> An Event of Force Majeure is an event or circumstance which is beyond the control and without the fault or negligence of the party affected and which by the exercise of reasonable diligence the party affected was unable to prevent.

Typically events that would be included in a definition of “force majeure” would include: Acts of God - earthquakes, floods, hurricanes, tornados or other physical natural disaster, but excluding ordinary weather conditions such as rain or snow; Riot, war, invasion, act of foreign enemies, acts of terrorism, seizure by a governmental authority, etc.;

Strikes or industrial disputes at a national level, or strikes or industrial disputes by labor not employed by the affected party, its subcontractors or its suppliers;

Nuclear explosion or contamination by radioactive material.

“Force Majeure” clauses are frequently included in transportation agreements, and must be very carefully worded. The list of events to be included (or excluded) in this type of definition is a matter for negotiation between the parties and should be reviewed by a knowledgeable transportation attorney.

240) FREIGHT CLAIMS – DELAY IN REJECTION

Question: We are a 3rd party shipper of a refrigerated product, which must be maintained at 35-40 degrees F. Our carrier’s reefer unit malfunctioned and when the product arrived at the customer it was at 68 degrees F. The consignee signed the bill of lading stating “product 68 degrees.” Two days later, the consignee called to reject the product stating that the product is no longer usable once it reaches 68 degrees F. The carrier acknowledges the malfunctioning reefer unit. We contracted for refrigerated transportation services & the product delivered warm.

Can the consignee reject this product 2 days after “accepting” it? Is there a “window” during which the customer can reject? Does the carrier have any liability in this matter? Does the consignee have any liability in this matter?

Answer: Section 2-513 of the Uniform Commercial Code is entitled “Buyer's Right to Inspection of Goods” and establishes a general rule that a buyer has a right to inspect goods either before or after acceptance “at any reasonable place and time and in any reasonable manner...” I would assume that a delay of one or two days in which to inspect or test a food product to determine whether it is suitable for human consumption is not unreasonable.

Note that this does not affect the risk of loss in transit, which is determined by the terms of sale (FOB origin, FOB destination, etc.) see U.C.C. Section 2-319. If there is loss or damage in transit, the party bearing the risk of loss in transit should file a claim with the responsible carrier.

241) FREIGHT CLAIMS – DENIAL OF BMC-32 CLAIMS

Question: I am a senior cargo claims analyst for a 3PL, based in PA (and a long standing member). Among our services we provide the filing, follow-up and recovery of cargo claims for over 700 organizations. I find myself once again in need of your assistance. I have 2 specific cargo claims, where I have reached somewhat of a stand still.

First Claim

Claim was filed against motor carrier in New York for a noted shortage of 24 cases. This was a live shipment with shipper load, driver count as are all shipments from the shipper, my customer. A few weeks after receiving our claim the carrier did issue a disallowance advising, “99 times out of 100 when all of a specific item shipped is short, it is because the loader failed to load on the truck.”

As such, they were not willing to participate in the claim. It was apparent that the carrier does not have legal grounds for his declination of my claim. I immediate issued a rebuttal advising the carrier’s obligation under the bill of lading contract to deliver the goods in same quantity and condition as it was tendered to them. Even after numerous follow-up phone calls, the carrier simply became unresponsive. Subsequently, I submitted this claim to carrier’s cargo

policy, specifically the BMC 32. I have been corresponding with the insurer for some time now and have yet to receive satisfaction. I first had to educate them on the existence of the BMC 32. The insurer adamantly states that the BMC is provided to protect shippers when the carrier becomes insolvent or bankrupt. The fact that the carrier is unresponsive is not grounds for submission under this endorsement.

Based on my experience, I know that to not be the case, however, I have searched all the texts (I have them all), the C.F.R. & the U.S.C. and have not found the wording in the applicable law stating that a shipper is not limited to make use of this endorsement in any circumstance other than insolvency or bankruptcy. Could you please assist me in locating this documented law or decision?

Second Claim

Claim was filed against motor carrier in Chicago, IL for a noted shortage of 20 cases. This too was a live shipment with shipper load, driver count. For several months after this claim was filed, we attempted to contact the carrier for status. We had several telephone conversations with a gentleman who "handled" the claim and seemingly knew nothing about claims. Eventually, the gentleman simply ceased communication. It was apparent we would not reach satisfaction with the carrier. Subsequently, I submitted this claim to carrier's cargo policy, specifically the BMC 32. I have been corresponding with insurer for some time and have yet to receive satisfaction. I first had to educate them on the existence of the BMC 32. While the insurer now agrees the BMC is a viable entity, they advise the carrier is not required to have that endorsement on their cargo policy. I provided documentation from multiple sources in support advising the BMC is a required rider on a cargo policy. The insurer responding by stating that: there is no law stating a insurer MUST provide a BMC 32 to a motor carrier policy when that insurance carrier writes that carrier's cargo policy; the text referenced (he refers to specifically as "an article, not a law") stating "all motor carriers should have been required to obtain..." was edited by Mr. Pezold, a shipper's advocate; the DOT regulates motor carriers, not insurance companies, and they cannot force an insurance company to add a BMC 32 to a cargo policy.

He attempts to twist the situation and somehow land on a planet where we, the 3PL, are liable for the loss.

Bottom Line: the insurer states that the loss in question is below the applicable deductible on the cargo policy and there is no BMC 32 endorsement on the policy in question.

Again, could you please assist me in locating the applicable law or decision to rebut his statements.

It is important to note that neither of these claims are of value great enough to warrant the cost of a suit and the first claim is time barred for suit. It is also important to note, this is not a loss my client is willing to incur. Any help you could provide would be greatly appreciated.

Answer: Both of these insurers do not know what they are talking about! (Which is typical, in my experience.)

Read the BMC 32 Endorsement at Appendix page B-99 in *Freight Claims in Plain English* (3rd Edition). In the middle of paragraph 3, it states "Irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured." That's your authority. If they don't agree, report them to the Federal Motor Carrier Safety Administration ("FMCSA"). They might suspend the insurer's ability to insure carriers.

The FMCSA requires motor carriers to file evidence of insurance when they register with the FMCSA. He is correct in that the FMCSA has no jurisdiction over insurers, but the carrier can't register without the BMC 32 Endorsement being issued and filed by the cargo insurer.

Therefore, the carrier can force them to file if they want to write the carrier's policy. If your shipment moved pursuant to a contract, the insurer may be claiming that the BMC 32 only applies to common carriers. However, Congress eliminated the distinction between common

and contract carriers in 1996. A New York District Court recently held that, therefore, the BMC 32 applies to all motor carriers. The case is on appeal and the disposition will be reported in the TRANSDIGEST when available.

Even when claims are too small to sue on, you should consider a small claims suit to let the carrier and/or insurer know that you will not stand for their improper disposition of claims.

242) FREIGHT CLAIMS – DISAPPEARING CARRIER

Question: We are a Freight Broker Agency for a Brokerage firm. Our loads are moved using for-hire carriers. What is the process or what steps do I take when a for-hire carrier picks up a load on time, but then we lose communication with the carrier, and the dispatcher? No one at the company is answering the phone or returning our calls. The carrier has not delivered the load and has had the load for 4 days when the total transit time was 2 days. What do we do in this situation?

Answer: As to the load in question, if you can't find the carrier or the truck, I suppose you could report it to the police as a stolen load.

I can't help but question how you got into this situation. Did you check out the carrier before tendering the load? We always advise our broker clients to conduct a basic "due diligence" check, which should - at the least - involve the following:

1. Check the Federal Motor Carrier Safety Administration website (http://www.fmcsa.dot.gov/ -- "Registration & Licensing" section)
2. Obtain a Certificate of insurance
3. Obtain References
4. Use written rate confirmations with all terms & conditions spelled out
5. If you expect to have a continuing relationship with the carrier, enter into a properly drafted broker-carrier transportation agreement.

Maybe you should tighten up your procedures.

243) FREIGHT CLAIMS – DOCUMENTING THE CLAIM

Question: Can a carrier request the inventory records from both the shipper and consignee pre and post shipping to prove that something was shipped? Do I have to prove this even if the bill of lading is signed?

Answer: If the carrier's driver was present and had the opportunity to count the cartons at the time of loading and signed the bill of lading with the carton count, that should be adequate proof as to the quantity received at origin.

The carrier can, of course, request additional information or documentation to support a disputed claim, but it would seem unreasonable if the above is true.

I would note that some shippers do have inventory management systems that can generate the type of records that you mention. If this information is readily available it might be advisable to furnish it in order to help resolve the claim.

244) FREIGHT CLAIMS – DRIVER NOT ALLOWED TO COUNT

Question: We are a carrier and have several customers that will not allow our drivers to be on their dock. Our shipper insists that we are responsible for piece count at the time of our receipt and allows us to verify each piece. The problem is at the time of delivery with the

consignee refusing to allow our driver on their dock to verify the piece count and condition of the items being delivered.

This week we had a shipment from a large computer/software company consignee to a large electronic retailer's distribution center. Before taking the shipment out for delivery, we verified that the piece count was still intact at our destination dock. We were not allowed to be at the back of our trailer to verify the piece count and condition of the shipments being delivered. The driver was told to sit in a break room as he was not allowed on their dock for insurance reasons. Once the shipment was unloaded, they handed our driver the delivery receipt that showed the shipment was short MP3 players.

These customers state their policy is for insurance reasons. Do we as a carrier not have a right to be on the customer's dock at the back of our trailer verifying the count and condition of each piece being delivered to protect our interests, not to mention the shipper's interests?

Answer: The situation you describe is quite common and frequently leads to disputes over cargo claims, particularly shortages at destination.

Obviously, it is in the interest of the carrier and the shipper to have the driver witness both the loading and unloading, to count the packages, to note the count on the original bill of lading (as well as any other exceptions that may be observed), and to sign the bill of lading to verify receipt by the carrier.

Unfortunately, this is not always done for a variety of reasons; it could be because the shipper does not allow the driver to witness the loading, or because the driver goes off for a cup of coffee, or because the trailer is "dropped" for the convenience of either the shipper or the carrier.

The bill of lading is both a receipt and a "contract of carriage", and a bill of lading is often referred to as "prima facie evidence" of the quantity and condition of the goods received by the carrier.

The Uniform Straight Bill of Lading contains the language: "RECEIVED ..... the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown) marked, consigned, and destined as shown below."

On full truckload shipments, where a trailer is placed or dropped for shipper loading and the driver is not present, the notation "SL&C" (shipper load & count) would normally be made on the bill of lading, and the legal significance of this notation is governed by the Bills of Lading Act, 49 U.S.C. 80101 et. seq., and the relevant court decisions.

On less-than-truckload ("LTL") shipments, if your driver is not permitted on the loading dock and cannot physically observe the count and condition of the goods as loaded by the shipper, you may wish to consider providing the driver with a stamp or label that could be applied to the bill of lading stating those facts.

The carrier, of course, has a duty to investigate all claims, see 49 CFR Part 370, and the disposition of each claim depends on the specific facts.

While the procedure I have suggested would not necessarily relieve the carrier from a valid claim for loss or damage discovered at destination, it helps to rebut the presumption that the bill of lading is the only evidence of what was received by the carrier, and should require the shipper to offer additional evidence of the actual quantity and condition of the goods that were tendered.

To answer your question, "Do carriers have the right to be on the consignee's dock while a shipment is being tendered for delivery? the legal answer is "No". The owner of the property has the right to establish rules for access by business invitees, and for safety and security, etc.

I would note that we have seen an unusual number of small shortage claims on deliveries to large retailers such as WalMart, Target, etc. where the carrier claims that it either dropped a trailer (often sealed) or that the driver was not able to observe the unloading in order to verify the count and condition of the shipment. Often it is difficult to obtain OS&D reports or other

contemporaneous receiving documentation, or statements from witnesses with actual knowledge of the facts to substantiate the shortage and the circumstances of its discovery.

Because the individual shortages are usually small dollar amounts, they pass "under the radar" and do not trigger full investigation. If this is a recurring problem, you may wish to involve your company security department.

245) FREIGHT CLAIMS – DROPPED TRAILER AGREEMENT

Question: I am a part of a 3PL that files cargo claims on behalf of the shipper. I have received declinations from less-than-truckload ("LTL") carriers stating that they (the carrier) have a dropped trailer agreement with the consignee in which the consignee has 24 hours of first break to advise/notify the carrier of any exceptions. If this does not occur within the specified time frame then the carrier states they are not liable for a claim on the shipment.

The carrier is not declining the claim because we didn't file the claim with in the Carmack time limit of nine months. They are declining based off this agreement since they are not allowed to be present at unloading, or to verify the piece count. Does the carrier's liability end at drop even if they are LTL and can show what they manifested in the destination trailer?

The consignees take deductions with the shipper on their short shipments even though it is the consignee that fails to "advise/notify" the carrier within the 24 hours, thus causing the declination.

Should the carrier still be liable to the shipper since this is an agreement between the carrier and the consignee? Are there any court cases to support?

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 "dropped trailer agreement" that the carrier may have with the consignee, the shipper cannot be bound by that agreement.

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. Likewise, there must be competent evidence from the consignee that there was in fact a 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.

There is one additional consideration. You have not indicated which party (seller or buyer) has the risk of loss in transit. If the terms of sale are "FOB Origin" or equivalent, under the Uniform Commercial Code it is presumed that risk of loss transfers to the buyer once the goods are tendered to the carrier at origin. If so, then the buyer/consignee should be filing the claims against the carrier, and it would be bound by its own "dropped trailer agreement" with regard to the carrier.

246) FREIGHT CLAIMS - DUTY TO MITIGATE DAMAGE

Question: I am a carrier who hauled dry plastic sheeting for broker. The consignee refused the shipment because 4 pallets that were double stacked had shifted and fallen down. The

broker is not paying us, saying there is a claim to take the shipment back to the shipper and re-package the 4 pallets.

I believe the consignee should have accepted the shipment and filed a claim for the 4 damaged pallets, instead of sending the whole shipment back. Secondly shouldn't the shipper have packaged the stuff in a manner to withstand the general rigor of transportation if he was going to double stack the pallets?

Answer: As a general principle, a consignee has a duty to "mitigate the loss" and should not reject a shipment to the carrier unless it is substantially worthless. However, this rule must be examined in the light of the facts and the individual situation.

From your description of the facts, it would appear that the consignee could have accepted the undamaged portion of the shipment and rejected the damaged pallets.

Your second question also involves an examination of the facts. The law places a difficult burden on the carrier. If the shipper proves that the shipment was in good order when tendered to the carrier at origin, and was damaged at destination, the carrier has the burden of proving that the cause of the loss was an "act or default of the shipper" (improper packing, blocking, bracing, etc.) AND that there was no negligence on the part of the carrier. See *Freight Claims in Plain English* (3rd ed. 1995) at Section 5.2.

You imply that the shipper loaded the trailer and double stacked the pallets. However, even if this was true, the carrier still has a responsibility to make sure that the load is properly secured. If there was any question about the proper loading, the carrier should not have accepted the shipment loaded in that manner. Likewise, it is possible that the load shift was caused by improper operation of the vehicle. In other words, there could still be carrier liability even if the shipper loaded the trailer.

247) FREIGHT CLAIMS – DUTY TO MITIGATE

Question: We are a frozen food third party logistics company who offers "pool consolidation" to our customers as a value added service. We do not own our own trucks, so we act basically as a freight forwarder and arrange for orders to be shipped and delivered. My question pertains to freight claims. We currently do not have a "customer" agreement that states that the customer is responsible to help mitigate the claim. We had a situation recently (in the summer time) where a load of baked goods was delivered to a consignee with a high temp. The customer refused the product (even though the temp was not above freezing) and returned the product to our warehouse. Our customer filed a freight claim with us and we filed it with the carrier. The carrier's insurance company asked for QA tests to be done or QA documentation from the customer stating why the product could not be sold for salvage or donated. The customer refused to do any of this testing and would not provide any real documentation other than an email stating that while the product was technically edible, it was not in a saleable condition because the thawing would cause one of the yeast ingredients to "fail" and the product would not rise in the way that it was supposed to per the packaging instructions. Basically, my question is "Does a customer have a legal responsibility to assist in mitigating a freight claim?"

Answer: If you were acting as a freight forwarder, you would have the same liability vis-a-vis your shipper-customer as if you were the carrier that actually transported the goods.

As a general rule there is a duty to "mitigate the loss" if it is reasonable to do so under the circumstances. This principle is found in the court decisions that discuss claims for loss or damage to goods in transit; see "Freight Claims in Plain English" (3rd ed. 1995) at Section 7.1.4.

Your customer apparently takes the position that the goods are unsaleable in their present condition, but refuses to have the product tested or provide adequate documentation in support of its position. Under the circumstances, you could refuse to pay the customer's claim unless it

provides adequate supporting documentation. If you have already paid the customer's claim, then you should have the right to take possession of the goods. You would also have the right to sell the product and retain the proceeds of any salvage, but be aware that since this is a food product you could be assuming product liability.

With regard to your claim against the carrier, if the customer won't cooperate, your company should retain an independent testing service to test the product or a qualified export to provide a report which can be submitted to the carrier or its insurance company.

Lastly, note that the failure to mitigate damages is a defense, and the burden of proving that the claimant failed to mitigate damages lies with the carrier.

248) FREIGHT CLAIMS - ELECTRONIC FILING OF CLAIMS

Question: We are a 3PL filing claims electronically with the carriers. Our claim invoice includes all of the information necessary to identify a shipment for the carrier as well as a product invoice or electronic extraction of the invoice. Other supporting documentation is not supplied with the first claim notice.

Although not explicitly contracted, it has been an expected practice with the carriers to acknowledge the receipt of the claim, and request any supporting documentation.

We now have a carrier that refuses to accept or acknowledge a claim unless all supporting documentation is supplied at the time of the invoice. We believe that we have provided the necessary documentation to begin the claims process.

What is your opinion on this process?

Answer: While your position seems reasonable, the answer lies in the FMCSA (formerly ICC) regulations at 49 CFR Part 370 that govern the filing and processing of loss and damage claims. The minimum requirements for a valid claim are:

> 370.3 Filing of claims.
>
> * * * * *
>
> (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.

The Code of Federal Regulations is available online at http://www.gpoaccess.gov/cfr/index.html. Enter 49cfr370 for the search and you will get Part 370, which I suggest that you read and familiarize yourself with.

249) FREIGHT CLAIMS – FAILURE TO PROVIDE CLEAN TRAILER FOR FOOD

Question: We hauled a bulk load of apples from Washington State to Michigan. At the time of loading the driver swept out the trailer and the shipper did not inspect the trailer to make sure it was clean, but loaded the trailer with the apples. When it got to Michigan, the load was condemned because of metal shavings in the back of the trailer. We were the third truck of

apples from the same shipper to be refused in a week. The broker has stated that the shipper will pay for the apples and the disposal of the fruit, but will not pay for our freight costs. Who is liable for the freight bills and are we entitled to the full freight charges? We feel that we are entitled to the freight charges since the driver swept out the trailer and the shipper did not do an inspection of the trailer to make sure it was clean.

Answer: As a general rule, the law places the burden on the carrier to provide suitable equipment for the goods that are being carried. When transporting any kind of food products intended for human consumption, there is a very high standard of care.

From what you have described, the apples were considered to be worthless at the time of delivery because of the contamination with metal shavings. Since this would be considered a breach of the contract of carriage, the carrier would not be entitled to its freight charges.

250) FREIGHT CLAIMS - FEDERAL CLAIM REGULATIONS

Question: I am reviewing a contract that refers to the following:

All claims will be filed and resolved in accordance with the provisions of 49 CFR 1005, including the I.C.C.'s order of 4/18/72 regarding "Twenty-Two Questions and Answers" in Ex Parte No. 263.

I cannot find any information regarding "Twenty-Two Questions and Answers" from Ex Parte No. 263.

Can you advise me what this is, and should you have a copy of this, can you forward to me.

Answer: First, the reference to "49 CFR 1005" is obsolete since that section of the regulations was re-numbered as "49 CFR Part 370" following the ICC Termination Act of 1995, and the transfer of functions to the FMCSA. Part 370 is entitled: "Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage".

Ex Parte 263 was an ICC proceeding that led up to the enactment of the regulations, and the "22 Questions and Answers" were published in an administrative order in 1972 to assist carriers in understanding and complying with the regulations.

A discussion of the claims regulations, together with the full text of the regulations and the "22 Questions and Answers" can be found in "Freight Claims in Plain English" (3rd Ed. 1995), which is available from the Council.

251) FREIGHT CLAIMS – FILING MULTIPLE CLAIMS ON SAME PRO NUMBER

Question: Is receipt of check and cashing the check for payment of claim final closure of that claim or can the shipper reopen claim with the carrier?

Can a shipper file more than one claim with the same LTL pro number?

The carrier damaged 2 units and we filed 2 separate claims for damage on the same pro number, one claim was paid in full. Now the carrier says we cannot file another claim on same pro number.

Answer: With regard to your first question, the following is an excerpt from *TRANSPORTATION, LOGISTICS and the LAW* by William J. Augello:

> Furthermore, parties should keep in mind that when dealing with a claim, if one party accepts a check tendered by the other party for less than the full amount and cashes that check, then the payee of the check may be adjudged by a court to have accepted the partial payment as payment in full. Whether or not the cashing of the check constitutes acceptance of a settlement is fact dependent and governed by state law. Therefore, parties should look for endorsements on the check such as

"payment in full" or words to that effect, and consult their attorney before depositing claim checks. See *Khoury v. Bekins Moving & Storage Co*., 2000 Tex. App. LEXIS 4833, (Ct. App. 5th Dist. Tex. July 24, 2000) (When carrier issued a check for $16,100 based on the declared value, claimant cashed the check and then sued for over $100,000, court held claimant entered into a valid accord and satisfaction).

As to your second question, there is no "law" or "regulation" that says you can't file two claims for shipments moving under a single bill of lading, but it is not a good practice and is likely to cause confusion. It all depends on the facts of the particular situation, but under the federal claim regulations at 49 CFR Part 370, the carrier has a duty to properly investigate and respond to all legitimate claims.

252) FREIGHT CLAIMS – FINES FOR MISSED DELIVERY

Question: What is the law concerning passing of fines to the carrier on missed delivery appointments. Different carriers of ours have missed delivery appointments and our customers have assessed the fines to us, and we in turn have passed them onto the carrier in the form of a freight claim. The carriers have declined the freight claim on the basis that it is "special damages". Our bill of lading ("B/L") clearly states that "All Delivery Fines are Passed to Carrier." Who is in the right in these instances, and what other recourses do we have if the carrier is right in declining these claims?

Answer: There are two separate contractual relationships: vendor-purchaser and shipper-carrier.

The first question is whether the purchase order or terms of sale provide for a penalty for missed delivery appointments. If they do not, the purchaser has no legal right to charge a penalty.

The second question is whether the contract of carriage provides for delivery at a specific date and time, and for a penalty if the appointment is not met. It could be argued that the notation on your bill of lading is sufficient notice that penalties will be passed on to the carrier. Otherwise, the carrier's only obligation is to deliver with "reasonable dispatch" and your attempt to collect the penalties would be considered "special damages". See *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3.

The best advice is to have a written transportation agreement with each of your carriers in which you spell out the terms and conditions, and clearly define the obligations of the parties. You can include provisions governing delivery by appointment, and the penalties or other consequences if appointments are not met.

253) FREIGHT CLAIMS - FOOD AND MEDICAL PRODUCTS

Question: I was at the claims filing and recovery class in Cherry Hill recently. I mentioned that I had a couple food claims that were giving me some trouble. The class was directed toward the shippers, but I think this question applies to both sides.

In all 4 cases my insured is the trucking company (carrier).

Claim #1 – Cargo is Graham crackers (value $37,000). The container fell over onto its side at very low speed. The shipper is concerned that too many of the crackers are broken to ship. They are still sorting the cases and inspecting the contents.

Claim #2 – Cargo is dry Pasta (I am told the value is about $14,000). The container fell over on its side into a ditch. The top of the container opened and a small number of cases were ejected from the container. The "dirty" cases were restacked with the "clean" cases and the

shipper now claims that the entire load could be “contaminated” and they will not accept any of the cargo back. They will not release any of the cargo for salvage.

Claim #3 – Cargo is medical supplies (Sterile water, plastic bags and IV injection connectors). The container was stolen and recovered about 4 weeks later. The cargo is 99% untouched and still has the inflatable bags in place. We assume the thief didn’t know what he was stealing and abandoned the trailer. The shipper will not even test the cargo to see if it’s contaminated. They want to destroy the whole load ($30,000). They will also not release the cargo for salvage.

Claim #4 - Cargo is Non-Dairy Creamer (23.5 oz plastic bottles, 12 bottles per cardboard case, $24,000). The trailer overturned and the cargo was ejected. The cases were picked up and moved to a warehouse. The shipper claims that this “food” grade product came in contact with the ground and must be destroyed. They will not release the cargo for salvage and will not accept the load for inspection.

In all 4 claims the cargo appears to have little if any actual damage. But with Food and Medical the shippers love to give me crazy scenarios of what “might” have happened or what “might” happen if they sell the cargo. Also in these 4 cases the shipper will not release the cargo for its salvage value due to Brand Name and liability issues.

Who has the burden of proof? Do I need to prove the cargo is safe or do they need to prove it is contaminated? I want to call the FDA on the pasta claim, but I don’t know if it is worth the battle. Are there independent experts I can call to inspect and test products like this?

My main concern is the legal liability of my insured (carrier). If I get salvage bids on the cargo and the shipper still refuses to release the cargo or deduct the salvage bid from the claim, is the carrier liable for more than the actual damage (invoice minus salvage)?

Answer: There are special issues regarding food and related products intended for human consumption.

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, which I have reproduced below:

> 11.5 CONTAMINATED SHIPMENTS
>
> The question of whether or not a shipment is damaged at the time of tender of delivery to the consignee is one of fact. With respect to edible products, this question is frequently answered by federal regulations which mandate the destruction of contaminated goods subject to those regulations.
>
> In *Pillsbury Co. v. Illinois Cent. Gulf R.R.*, 687 F.2d 241 (8th Cir. 1982), there were foreign grain beetles in the railroad cars upon arrival at destination, but there were no beetles in the bags of flour. The carrier railroad argued that, since there was no damage to the flour itself, the railroad is not liable. The court rejected this argument since the flour was made unfit for human consumption by being held under insanitary conditions whereby it may have become contaminated. As a matter of federal law, the goods were damaged.
>
> The necessity of ensuring that rail cars loaded with bulk flour reach their destination in a pristine condition is mandated by federal law. Under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 321, et. seq., processors and distributors of foodstuffs intended for human consumption are held to very strict sanitary standards to ensure the safety and purity of their products.
>
> The standard to be applied in cases of this kind is set forth in Section 402 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 342(a)(4), Appendix 48, which states:

> 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 in filth, or where by it may have been rendered injurious to health. . . ”(emphasis added)
>
> The law is clear. If a food product has been held under insanitary conditions and thereby may have been subjected to contamination, or otherwise rendered injurious to health, it is adulterated for purposes of the Act. *United States v. Nova Scotia Food Products Corp*., 417 F.Supp. 1364 (E.D. N.Y. 1976); *United States v. 1,200 Cans, Pasteurized Whole Eggs*, 339 F.Supp. 131 (N.D. Ga. 1972). It should be noted that in *Pillsbury*, the court did not award as damages the total value of the adulterated flour, only the fumigation charges incurred to render the flour unadulterated.
>
> Another case involving contamination is *Seaboard Allied Milling Corp. v. Consolidated Rail Corp.*, unreported, (D. Colo. 1980), see appendix 116. In that case, a railroad car was loaded by Seaboard with 100,000 pounds of flour. When Seaboard tendered the car to Conrail, all of the hatches of the car had been covered and sealed to ensure that the flour would not be exposed to contamination or adulteration during transport. Upon arrival at destination, it was discovered that a forward hatch had been opened, thus exposing the flour to possible contamination.
>
> The court, citing the Food & Drug Act, held that, since the hatches of the car were opened, the flour may have become contaminated, and thus would be considered “adulterated”. Conrail was held liable for the damage.

Obviously, with the type of claims that you have mentioned, there are a number of factual issues and it is likely that a carrier might refuse to pay the claim and argue that the rejection of the shipment was unreasonable or that the claimant failed to mitigate its damages.

The manufacturer or seller has a legitimate concern about the product quality, potential product liability, and injury to its reputation and trademark.

If the integrity of any of the packages or containers has been breached or compromised in any way, that product should be destroyed. Likewise, even if the packaging appears intact, it may be appropriate to open some of the drums for random sampling and testing.

In order to prevent disputes with carriers as to whether product must be destroyed or whether it can be salvaged, I generally advise the shipper to get an opinion from its quality control department or a qualified testing lab. In some cases, the FDA or the USDA will intervene and order that product be destroyed. It may be noted that the reasonable expenses of inspection, sampling, testing, etc. would be a legitimate claim that the carrier should pay.

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”.

The answer to your question does, of course, depend on the particular situation. However, I think that with food and related products, any legitimate question as to quality, possible contamination or adulteration would generally justify destruction of the product, without salvage or an allowance for salvage.

254) FREIGHT CLAIMS – FREIGHT CHARGES ON DESTROYED SHIPMENT

Question: An entire truckload of cargo has been involved in an accident and is a total loss. There is no dispute about the claim and the carrier's insurance company is planning to make payment for it. However, the carrier has submitted a freight bill to us (we are a broker) and stated that we were still obligated to pay them for the freight even though they hadn't made any of the delivery stops prior to the accident. It has always been my understanding that the carrier should seek to recover the lost expenses for such a claim from their own insurance company and not from the shipper or broker with whom they contracted since the carrier didn't complete any of the contracted work. Please advise.

Answer: As a principle of contract law, if the carrier fails to deliver a shipment, it has breached the contract of carriage and has not earned its freight charges.

Likewise, if there is a partial delivery, and a portion of the shipment is lost or damaged, the claimant will usually be entitled to recover a pro-rata portion of the freight charges (if they were paid) based on the ratio of the weight of the lost or damaged goods to the weight of the total shipment.

From the facts as you have described them, the carrier cannot recover its freight charges from the shipper (or from the broker, if his contract is through a broker).

255) FREIGHT CLAIMS – FREIGHT CHARGES ON RETURN SHIPMENTS

Question: My customer has refused a shipment, noting, "refused" on the delivery receipt. The shipment was refused because the packages were in terrible condition, which lead the customer to believe that there may be substantial damage to the product inside. When the product was received and inspected we determined there were no damaged parts.

Who pays the freight charges for this shipment both to the customer and the return to us? Original freight charges to customer were prepaid by shipper. Also, if the customer has noted, "refused due to damage" and we still inspected parts and there was no damage would carrier be obligated to pay freight charges both ways.

Answer: The carrier may argue that there was no damage to the product and that the consignee had a duty to mitigate damage, i.e., to open the package and inspect the product for damage.

On the other hand, depending on what the item was, it may be that the consignee had no facility or capability for inspecting or testing the item. In that case, it would be reasonable to return the item to the vendor, have it inspected and repackaged, and re-sent to the customer. The costs of shipping, inspection, repackaging, etc. would be considered reasonable expenses incurred in mitigating the damage, which the carrier should pay.

I would also note that, if this involved retail packaging that would be displayed in store for consumer purchase, a badly damaged package is usually unsaleable. Here again, the freight charges, inspection and re-packaging costs would be a proper claim.

256) FREIGHT CLAIMS – GOVERNING REGULATIONS

Question: Is there some thing covering the railroads that is similar to 49 CFR 370 (370.1 - 370.11) which covers motor carriers, water carriers and freight forwarders that are subject to 49 USC, subtitle IV (b)? Just what kind of water carriers are covered under that subtitle?

Answer: After ICCTA, the motor carrier claim regulations were transferred to the FMCSA section of Title 49 CFR and re-designated as Part 370. The regulations at Part 370 removed the references to "railroad" and "express company":

Sec. 370.1 Applicability of regulations.

The regulations set forth in this part shall govern the processing of claims for loss, damage, injury, or delay to property transported or accepted for transportation, in interstate or foreign commerce, by each motor carrier, water carrier, and freight forwarder (hereinafter called carrier), subject to 49 U.S.C. subtitle IV, part B.

The old ICC claim regulations at Part 1005 were left under the STB section, and are still there (without any changes in the wording) and are still in effect:

CHAPTER X--SURFACE TRANSPORTATION BOARD, DEPARTMENT OF TRANSPORTATION

Sec. 1005.1 Applicability of regulations.

The regulations set forth in this part shall govern the processing of claims for loss, damage, injury, or delay to property transported or accepted for transportation, in interstate or foreign commerce, by each railroad, express company, motor carrier, water carrier, and freight forwarder (hereinafter called carrier), subject to the Interstate Commerce Act. [46 FR 16224, Mar. 11, 1981]

257) FREIGHT CLAIMS – IMPROPER PACKAGING

Question: We are a freight broker and arranged a shipment with a less than truckload carrier. The item shipped was 17' long and used. It was damaged and a claim was filed with the carrier claims department. The item was mistakenly unloaded in a different city 250 miles away and the truck arrived empty at my customer's location. The driver then turned around and picked it up and delivered the next day. The item was concealed with a tarp and the damage was not noticed until later that day. We notified the claims department right away. The carrier is now claiming that the item was not packaged correctly and they are not responsible for the driver letting the freight gets unloaded at a wrong location. My customer is now ready to take legal actions against us, the broker.

Carriers are known for refusing freight that is not packaged correctly and have informed us prior to loading, with a request of a Waiver to be signed, waiving any liabilities that may arise due to damages, prior to shipping and/or requesting the items be packaged to their insurance standards, in which this carrier failed to inform us.

Here are my questions:

1. What else can I do to re-open this case? Can I contact their Insurance company directly?
2. Can my customer sue the trucking company and/or their Insurance company?
3. Can my customer sue us?

Answer: Improper packaging is a defense that must be established by the carrier, and the carrier has the burden of proving that the improper packaging was the sole cause of the damage, AND that it was free from any negligence. From your description of the facts, it would appear that the carrier is liable for the damage.

Answering your specific questions:

1. You can submit factual evidence that the packaging was adequate, for example, that prior shipments were packaged the same way and arrived without damage, and ask the carrier to reconsider the claim. Although you probably cannot proceed directly against the carrier's cargo legal liability insurance policy, you may be able to recover under the carrier's BMC-32 endorsement (up to $5000).

2. Your customer (the shipper or consignee) can bring an action against the trucking company if the claim is not paid. As a broker, you should not do this since you have no beneficial or other ownership interest in the shipment.

3. The customer can sue you as a broker, and brokers are often sued. However, the court decisions generally say that a broker is not liable for loss or damage in transit unless the broker was negligent and its negligence caused or contributed to the loss.

258) FREIGHT CLAIMS – IMPROPER PACKAGING DECLINATION

Question: When I file a claim with United Parcel Service (UPS) they deny the claim asserting that the packaging was insufficient. It appears that they pick the orders that I add extra insurance to. It is my understanding that they have to prove to me that they received something that was improperly packaged. Is this true, and is there anything I can do to stop this from happening?

Answer: You are correct. From a legal standpoint, "improper packaging" is a defense and the carrier has the burden of proving that the damage was due to the improper packaging AND that it was free from any negligence, see "Freight Claims in Plain English" (3rd. Ed. 1995) at Sections 5.1 and 6.5.

You are not the only one that has problems when dealing with UPS and we get many complaints about their handling of claims. My suggestion is to talk to your UPS representative and see if you can resolve these issues. If that fails, your recourse is to bring a lawsuit.

259) FREIGHT CLAIMS – IMPROPER PACKAGING

Question: We are a freight broker and arranged a shipment with a less than truckload carrier. The item shipped was 17' long and used. It was damaged and a claim was filed with the carrier claims department. The item was mistakenly unloaded in a different city 250 miles away and the truck arrived empty at my customer's location. The driver then turned around and picked it up and delivered the next day. The item was concealed with a tarp and the damage was not noticed until later that day. We notified the claims department right away. The carrier is now claiming that the item was not packaged correctly and they are not responsible for the driver letting the freight get unloaded at a wrong location. My customer is now ready to take legal actions against us, the broker.

Carriers are known for refusing freight that is not packaged correctly and have informed us prior to loading, with a request of a Waiver to be signed, waiving any liabilities that may arise due to damages, prior to shipping and/or requesting the items be packaged to their insurance standards, in which this carrier failed to inform us.

Here are my questions:

1. What else can I do to re-open this case? Can I contact their Insurance company directly?
2. Can my customer sue the trucking company and/or their Insurance company?
3. Can my customer sue us?

Answer: Improper packaging is a defense that must be established by the carrier, and the carrier has the burden of proving that the improper packaging was the sole cause of the damage, AND that it was free from any negligence. From your description of the facts, it would appear that the carrier is liable for the damage.

Answering your specific questions:

1. You can submit factual evidence that the packaging was adequate, for example, that prior shipments were packaged the same way and arrived without damage, and ask the carrier to reconsider the claim. Although you probably cannot proceed directly against the carrier's cargo legal liability insurance policy, you may be able to recover under the carrier's BMC-32 endorsement (up to $5000).

2. Your customer (the shipper or consignee) can bring an action against the trucking company if the claim is not paid. As a broker, you should not do this since you have no beneficial or other ownership interest in the shipment.

3. The customer can sue you as a broker, and brokers are often sued. However, the court decisions generally say that a broker is not liable for loss or damage in transit unless the broker was negligent and its negligence caused or contributed to the loss.

260) FREIGHT CLAIMS – INCLUDING COST OF SHIPPING

Question: I have a claim question that one of my customers is asking. My customer wants to know about claiming the freight charges for replacement orders that have to be shipped because of damage to the original order. Can this be claimed? Or does the claim have to be for the prorated portion of the original shipment?

Answer: The replacement shipment is a separate transaction and is independent of the original shipment that was damaged.

Where freight charges have been paid to the carrier, and the goods have not been delivered or have been damaged so they are substantially worthless, the claimant may recover them on the theory that the carrier has not performed the contract.

Where the claim is based on the destination value of the goods, that value presumably includes the delivery charges, and thus the freight charges may not be separately claimed. For example, if freight costs are prepaid and included in the invoice price, the invoice value to the purchaser represents the full value of the goods.

If the claim is not based on the destination value of the goods, then 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* (3rd Ed. 1995) at Section 7.4.9.

261) FREIGHT CLAIMS – INCLUSION OF FREIGHT CHARGES

Question: We are a freight broker who received a claim for loss or damage from a customer. In the claim they included a prorated percentage of the outbound freight.

What we want to know is can they do this?

Answer: Understand that brokers are generally not liable for freight claims unless they contractually agree to be. That being said, I am assuming that this is a partial loss. If so, the measure of damages may include a pro-rata portion of the freight charges (usually based on the weight of the damaged goods vs. the weight of the total shipment). The reason is that the failure to deliver the goods is a breach of the contract of carriage and the shipper is entitled to recover its actual loss.

The answer actually depends on whether the claim is based on the cost (FOB origin) plus the freight charges, or on a delivered price to the customer (which would include the cost of delivering the goods) - in which case the freight charges cannot be separately claimed. In either case, it would be a condition precedent that the freight charges had been paid.

262) FREIGHT CLAIMS – INCLUSION OF SALES TAX

Question: I file freight claims (for outbound shipments) on behalf of our customer. I file just as if the customer were filing themselves. I then apply the check received against the customer's account or invoice. I submit the original invoice to the transporter with the freight claim. Is the transporter required to pay sales tax on a freight claim if the sales tax is broken out on invoice? (The sales tax was a separate line item on the invoice - not included within the selling price.)

Answer: I am assuming that the goods were sold "FOB Origin" and that the risk of loss passed to the buyer-consignee upon tender to the motor carrier at your facility. If so, the buyer would still have to pay the seller for the goods and the measure of damages would normally be the full invoice price (including any sales tax). Otherwise, the buyer would not be fully compensated for its actual loss.

I would note that it might be possible, depending on your state tax laws, to apply for a credit or refund of sales tax if a high value shipment were totally destroyed in transit. You would have to check your state tax commission or tax accountant to see is this can be done. If you were to recover a credit or refund, it would be applied to the claim.

Unfortunately there is no law or regulation that would prevent the broker from holding payment of your freight charges pending resolution of the cargo claim. Unless you are able to resolve the impasse, your only recourse may be to bring legal action against the broker for your freight charges.

263) FREIGHT CLAIMS – INCOMPLETE DOCUMENTATION

Question: We are being charged back by a customer of ours due to concealed shortages (we are the shipper). The bill of lading ("B/L") has no driver signature and the shipment was prepaid. The proof of delivery from the carrier was signed clear at the destination. Who is responsible for the charges? Do we have any recourse with either the customer or the carrier?

Answer: You haven't provided enough information to give an answer.

There are really two issues:

1. Where did the shortage occur? This is a factual question that can only be determined through a proper investigation. It could be that the goods were never shipped, that they disappeared during transit, or that they disappeared after delivery to the consignee. Only if the goods were actually received by the carrier at origin, and were not delivered, is the carrier liable.

2. Which party (seller or buyer) had risk of loss in transit? This depends on the terms of sale - whether it is "FOB Origin" or "FOB Destination".

264) FREIGHT CLAIMS – INDUSTRY STANDARDS

Question: What is the percentage range for freight claims filed where the claim is settled or paid out? For instance, if there were 100 freight claims filed, how many claims would we see a check come back for: 25, 50, 75? What would be considered an industry standard, if there is one?

Answer: According to a survey done by the Transportation Loss Prevention & Security Association of major LTL carriers for the year 2004:

Total number of claims paid vs. number of claims filed	75.40%
Total dollars paid v. total dollars filed	39.50%
Net claim dollars paid v. total dollars filed	34.90%

Percent of claims filed to total number of shipments made	0.61%
Total company claim ratio	1.20%

265) FREIGHT CLAIMS – INDUSTRY STATISTICS

Question: Our company is currently reviewing the process in place for filing of its freight loss and damage claims. The question has been raised regarding our measurements versus industry averages (i.e. the dollar amount of claims to total carrier spend, total number of shipments to shipments with claims, percentage of claims successfully collected, and any other common measurements). I have found many articles regarding the claims filing process, but I have been unable to find information regarding industry standards or metrics.

In order to make an informed decision regarding if our company should revise its claims filing processes, members of management would like to compare our numbers with accepted standards. Could you provide me with this information or point me in the direction of where this information may be found?

Answer: Years ago the Interstate Commerce Commission used to require motor carriers to report loss and damage statistics, but that requirement was eliminated. Unfortunately, there is no public source for this information.

The Transportation Loss Prevention & Security Association did conduct a survey done of major LTL carriers for the year 2004 which gave the following summary information:

Total number of claims paid vs. number of claims filed	75.40%
Total dollars paid v. total dollars filed	39.50%
Net claim dollars paid v. total dollars filed	34.90%
Percent of claims filed to total number of shipments made	0.61%
Total company claim ratio	1.20%

266) FREIGHT CLAIMS – INSPECTION OF CONCEALED DAMAGE

Question: I have run into a pattern from common carriers not inspecting damaged freight for a couple reasons. One reason is, it is under a certain amount that they have set policy not to inspect, and the other is not inspecting concealed damage.

I have challenged nonpayment of these claims by contending that 49 CFR requires all claims to be fully investigated and by not inspecting the carrier has forfeited their rights to deny the claim by not fully investigating. If they do agree to pay anything, they always come back and offer 1/3 settlement and sometimes automatically send a check for this amount. I hold onto the check and challenge for the remaining balance of the claim. The reason for this is, the ICC had challenged and denied this practice based on it limiting the carrier's liability.

Am I correct in what I am doing and for the right reasons?

Answer: You are correct. I would refer you to the relevant items in the National Motor Freight Classification that deal with concealed damage:

Item 300140, Inspection by Carrier, requires the carrier to make an inspection "as promptly as possible and practicable after receipt of request by consignee."

Item 300145, Failure to Inspect, states: "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."

As for the "1/3 settlement", there is no legal basis for this practice. Either the loss or damage occurred in transit, or it did not.

267) FREIGHT CLAIMS - INSPECTIONS

Question: We had a delivery that arrived damaged. The damages were obvious while the product was still in the trailer, which was so noted on the delivery receipt. We also took photos while the goods were still in the trailer. There was no salvage value and so the product was disposed of.

The carrier acknowledges the damage, however it has denied our claim and offered only 20% salvage allowance on the basis that we disposed of the freight prior to carrier inspection and subsequent salvage. The carrier cited the National Motor Freight Classification ("NMFC") Items 300140 & 300150 and said that the documentation we provided did not establish that all of the items claimed were a total loss.

What are these items and what can we do?

Answer: The relevant items are NMFC items 300140, 300145 and 300150.

Item 300140 requires the carrier to make an inspection "as promptly as possible after receipt of request by consignee." It also says "Consignee must cooperate with carrier in every way possible to assist in the inspection." It does NOT say that a claim can be declined merely because the consignee does not request an inspection.

Item 300145, Failure to Inspect, states: "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, states that it is the duty of the consignee to retain damaged merchandise until the carrier desires to take possession of the goods for salvage. But it also says "The above applies only when the carrier and consignee agree that the carrier will handle disposition of the salvage..."

Reading these provisions together, while it may be a good practice to request an inspection, and to hold the goods for the carrier to make its inspection, a failure to do so is not a proper basis for declining the claim -- if the consignee can clearly establish that the damage existed at the time of delivery, the extent of the damage, and that it was not practical to salvage the damaged goods.

I would recommend that you supplement your claim with an additional written statement provided by a person that has actual knowledge of the facts, and request the carrier to reconsider its declination.

Note: Items 300140, 300145 and 300150 do NOT appear in the federal regulations at 49 CFR Part 370, Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage.

268) FREIGHT CLAIMS - INSPECTIONS

Question: I have just opened my freight claim inspection business. When I do an inspection I do not give any opinion information on the report. I state strictly the facts, i.e. "4 scratched", etc. What kind of liability if any, could I be facing to the shipper, consignee, or freight company on outcomes of the freight claim? I state on my invoices that I am not responsible or liable of any outcome of the claims.

Answer: I think that if your inspection reports are factual and professionally done, you should not have any liability regarding the outcome of a claim. (You might be called as a witness if a claim is put into suit, but normally you would be paid for your time.) The only exposure that you could have would be from proof that the inspector engaged in collusion with the carrier to produce a biased, incomplete or false report.

269) FREIGHT CLAIMS – INSURANCE COVERAGE AND RELEASED RATES

Question: We had an "interplant" shipment and the carrier was in an accident caused by a third party. The motor carrier's insurance underwriter is covering the matter. The problem involves a letter from the freight owner to the freight broker agreeing to limit all interplant truckload shipments "to a value not exceeding $100,000" that was signed by the freight owner.

The motor carrier's insurance adjuster became aware that the value of the freight was $355,000 and is trying to pro-rate its settlement to $28,000 ($100,000/355,000 – based on a breach of the co-insurance clause in the insurance policy). It was the freight owner's intent to limit the value of the shipments, not be a co-insurer. What do you suggest?

Answer: As I understand it, the motor carrier has an enforceable liability limitation of $100,000, so that is the most it would have to pay the shipper under any circumstances.

The motor carrier's insurance policy, if it is a typical Motor Carrier Legal Liability Policy, would require the insurer to indemnify the motor carrier for its actual legal liability (payment made to a shipper), subject to the policy limit (and any other relevant conditions). (I assume that the policy limit is at least $100,000.)

Obviously, I haven't read the policy, but I don't see how a co-insurance provision would have anything to do with the insurer's obligation to indemnify the carrier.

I would suggest that the carrier submit its claim to the insurer for the actual amount ($100,000) that it paid to the shipper.

270) FREIGHT CLAIMS - INSURANCE V. LIABILITY

Question: On October 25th, a truckload of furniture was picked up at our warehouse by an outside carrier. This was two-stop load. The freight terms on both orders were prepaid and add. On the way to the first stop the driver got into an accident and the truck overturned. We were asked to have a representative from our company meet with an adjuster to assess the damage. The total dollar amount of shipped goods was $26,466.00. The insurance company claims some items were inspected and could be re boxed and returned. The insurance company sent us a check in the amount of $1,932.28.

Unaware of what the check was for, we called the freight carrier. They advised that we should just apply it the largest dollar amount invoice. We later found out the check was for the cost of re boxing over the $2,500.00 deductible. The insurance company claims our representative agreed to this settlement.

Meanwhile, there is nothing in writing to confirm this agreement and the insurance company is not even sure where the merchandise is.

We have advised the insurance company that all of this is unacceptable. We do not want this furniture returned and we want to be compensated in full for all of the merchandise. We feel the safety of our merchandise has been compromised and we will not run the risk of being held liable if the merchandise malfunctions at the end user. Isn't the carrier liable? How should we proceed from this point?

Answer: There are a number of issues involved in your questions.

1. The liability of the motor carrier is independent of whether it has insurance or not that covers the loss. Furthermore the carrier is liable for the full actual loss, regardless of whether there is any deductible in its insurance policy (unless there is some enforceable liability limitation in its bill of lading or tariff).

2. There is a "duty to mitigate the damages", which usually means that reasonable measures should be taken to repackage, repair or salvage the damaged goods. On the other hand, if your inspection of the damaged goods indicates that they cannot be safely repaired or that there

would be some legitimate possibility of personal injury or product liability, then it would be reasonable to insist that the goods be destroyed and not sold to the general public.

3. I don't know what is meant when you say "we should just apply it the largest dollar amount invoice". The carrier would be liable for the loss or damage whether there were one shipment or two separate shipments in the truck.

4. Don't cash the check!

271) FREIGHT CLAIMS – INSURANCE VERSUS LIABILITY

Question: A shipper enters into a contract with a contract carrier (motor) and stipulates that they must have $500,000 in cargo liability. Both parties agree and sign the contract.

1st case:

There is a claim for total loss. But, the carrier only has $100,000 in cargo insurance. The shipper never saw the insurance certificate showing the $100,000. The shipper assumed that the contract was good enough.

2nd case:

There is a claim for total loss. But, the carrier only has $100,000 in cargo insurance. The shipper received a copy of the insurance certificate showing that the carrier held only $100,000. But the shipper, believing that since they had a contract agreeing to $500,000 cargo liability, insists that it would still be entitled to receive full coverage up to $500,000.

Answer: First, you are "mixing apples & oranges"...

The liability of a common carrier is for full actual loss, unless there is an agreement to limit liability, see 49 U.S.C. 14706 (the "Carmack Amendment"). This liability is independent of whether the carrier has insurance or not. If the carrier fails or refuses to pay a claim for loss or damage, the shipper's remedy is to bring a lawsuit for breach of the contract of carriage under the Carmack Amendment.

As for cargo insurance, if the shipper has a transportation agreement under which the carrier agreed to provide a certain level of cargo insurance, and has not done so, the shipper would also have a separate cause of action against the carrier for a breach of the transportation agreement, i.e., failing to provide the agreed insurance coverage. I do not think the fact that the shipper may have been provided with a certificate showing a lesser amount would be a defense to such an action, though the carrier might try to argue that by showing the shipper an insurance certificate for a lesser amount, the shipper waived that term by not objecting.

Obviously, if the carrier is insolvent, bankrupt or otherwise unable to pay the claim, it doesn't make much difference.

272) FREIGHT CLAIMS – INTERLINE CARRIERS

Question: One of our distribution centers hired a carrier to haul two pallets from Milwaukee, WI to Hibbing, MN. The carrier is listed as a contract carrier with the DOT, however, we never executed a contract. (I was not aware of the carrier/move until the claim showed up)

We issued the bill of lading for 89 cases, their driver counted and signed for it.

The carrier then interlined it to an LTL company. They used a uniform bill of lading ("B/L") listing themselves as the shipper and the carrier. The customer in Hibbing, MN is listed as the consignee.

The interlined B/L shows 2 skids foodstuffs. Our bill of lading was much more detailed and included tobacco and cigarettes.

The interline carrier delivered short in Hibbing, MN. So, the interline carrier hired an expeditor to bring the remaining items in later that evening.

The second delivery was also short (all the tobacco and cigarettes).

Who is our claim with? We have three carriers involved. We did not know the carrier we hired would interline. We also did not have a relationship with any of the other carriers. I filed with the original carrier, but doubt we will be paid.

In the meantime, this carrier has been telling me he shut down the business that hauled the shipment and has started up a new one. However there is no record of the name change or operating authority. The D & B does not support any of his rhetoric, nor can I find a business listing after a search on the state website. He feels he has no liability and has sent a denial letter for the full claim of $11,000.

Do I have any remedies with the second or third carrier? (In my opinion, the second carrier is the only potentially honest party). I am considering filing against the BMC, for the $5,000 and suing the initial carrier for the balance.

Answer: Your contract of carriage (bill of lading) is with the first carrier - the one that actually received the goods. This carrier is primarily liable for the loss, regardless of where it may have occurred. Any subsequent bills of lading are not binding on you and have no legal effect.

Under the Carmack Amendment, 49 USC §14706, the receiving (first) carrier and the delivering (last) carrier are both liable for loss or damage. If the receiving carrier is insolvent or out of business, you can pursue the delivering carrier. In addition, if you know that the loss occurred while the goods were in the possession of an intermediate carrier, you can also sue that carrier.

You can, of course, file against the BMC 32 - if the carrier has one. At present, the FMCSA does not require “contract” carriers to maintain a BMC 32, even though the legal distinction between contract and common carriers was eliminated by the ICC Termination Act of 1995 - over 8 years ago.

273) FREIGHT CLAIMS - INTERLINED SHIPMENTS

Question: A choice carrier comes in and picks up some freight, then interlines it with another carrier without the shipper’s knowledge. The freight is then damaged by the interline carrier. When the shipper files a freight claim against the choice carrier, the choice carrier says payment has to wait until they get their money from the interline carrier. Is this true? Would the shipper have to wait?

Why would this not be a problem between the choice carrier and its interline carrier?

Answer: Your “contract of carriage” is with the receiving (first) carrier and it is liable for loss or damage regardless of whether the loss occurs while in its possession or in the possession of a connecting carrier.

This is a basic legal principle as reflected in the “Carmack Amendment”, 49 U.S.C. 14706, which provides in relevant part:

> Sec. 14706. Liability of carriers under receipts and bills of lading
>
> (a) GENERAL LIABILITY-
>
> (1) MOTOR CARRIERS AND FREIGHT FORWARDERS- A carrier providing transportation or service subject to jurisdiction [of the Secretary of Transportation]. . . shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service . . . are liable to the person entitled to recover under the receipt or bill of lading. 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 . . .

I would note that the statute also provides a remedy for the receiving carrier (or the delivering carrier) to seek reimbursement or indemnification from another carrier that may have actually caused the loss.

To answer your question, you should not have to wait until the receiving carrier is paid by the interline carrier.

274) FREIGHT CLAIMS – INTERNATIONAL AIR FREIGHT

Question: We are a freight forwarder who hired an international air carrier to move some freight for our customer from Portugal to the US. The air carrier's ground handler damaged the freight (total loss). Our customer issued a claim against us for $26,000. We transmitted the claim to the airline. The air carrier limited liability is $5,778.00. The air carrier, despite repeated phone calls and letters, has not paid this claim. Our customer has deducted the amount of their claim from our account with them. Our legal department says that due to court costs, it is not worth suing the air carrier. The air carrier has not issued a declination, rather they simply refuse to return my phone calls or answer my letters. I would like to collect at least the limited liability amount. Do you have any suggestions?

Answer: I would first note that there are two issues: your liability as an air freight forwarder to the shipper, and the air carrier's liability to your company as the air freight forwarder.

Assuming this was an international air shipment, I would assume the Warsaw Convention (or Montreal Protocol #4) would be applicable and would also be incorporated by reference into your house air waybills. If so, both your liability and that of the air carrier would be limited by the applicable treaty.

With respect to your claim against the air carrier, I assume that you have a clear case of liability, and have filed a timely claim for the damage. Unfortunately there is no government agency or other body that can force an air carrier to pay claims. Thus, if the air carrier refuses to pay the claim, your only recourse may be to retain counsel and bring a lawsuit.

275) FREIGHT CLAIMS - INTERNATIONAL RAIL SHIPMENT

Question: We have a rail shipment from Manitoba, Canada to North Carolina moving on a through bill of lading ("B/L"). Incident happened while in Canada on the Canadian Pacific. If litigation became necessary, what laws and jurisdiction would apply?

Answer: As a general rule, Canadian law would apply since the contract of carriage was made in Canada (unless there is a rail transportation contract that would specify something different).

Regarding jurisdiction & venue, you usually would bring suit against either (1) the receiving carrier, at the place of origin, or (2) the delivering carrier, at the place of delivery, or (3) the carrier in possession of the goods, if known, at the place where the loss occurred.

In order to be more specific, it would be necessary to review the relevant documents. It may also be necessary to obtain Canadian counsel.

276) FREIGHT CLAIMS – ISSUES REGARDING SHIPPER LOAD AND COUNT

Question: One of our outside warehouses has a form it requires drivers to sign. One section pertains to preloaded trailers. It reads:

THIS FACILITY IS NOT A SHIPPER LOAD AND COUNT FACILITY. THE PRESENCE OF ANY SEAL IS FOR SECURITY PURPOSES ONLY AND DOES NOT

CONSTITUTE SHIPPER LOAD AND COUNT. THE FACT THAT THE TRAILER WAS PRE-LOADED DOES NOT RELIEVE CARRIER LIABILITY.

Your load was completed prior to your arrival for carrier convenience. All claims of over, short or damage MUST be reported to_____AT THE TIME OF DELIVERY. Telephone_____. Non-notification will result in denial of claim.

We feel this is hogwash and holds no legal authority as the fact remains shipment in our opinion is still shipper load & count (SL&C) under these conditions. Is that correct?

Also, would the circumstances change if this warehouse added additional language such as: At driver's request we will break the seal for driver inspection of the load, and reseal trailer upon completion amending the bill of lading with new seal number.

Even in this situation the driver could not physically see most of the load since viewing it only from the rear, and not during the actual loading process. It would only serve to verify that the load itself was properly secured, but not that there were any shortages or preload damage.

Answer: 1. 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 "SL&C". (On the other hand, the mere fact that a trailer is delivered with the shipper's origin seal intact is not conclusive proof that loss or damage could not have occurred in transit.)

2. The addition of language to the effect that "At driver's request we will break the seal for driver inspection of the load, and reseal trailer upon completion amending the bill of lading with new seal number" is apparently intended to establish that the carrier did have opportunity to inspect the loading, and that it waived its right to do so. However, it is unlikely that the driver would unload, count and reload the entire trailer, so any "inspection" would probably be limited to a doorway inspection.

3. The bottom line is that if there is a shortage reported at destination, and the trailer is delivered with seal intact, the carrier will still decline the claim. Regardless of what it says on the paperwork, you will have a factual dispute.

4. The better practice - always - is to require the driver to be present and to have the driver observe the loading, count the packages, and sign for a piece count.

277) FREIGHT CLAIMS – LATE DELIVERY

Question: We are a freight forwarder. The shipper, a prepackage gift fruit provider, contracted us to arrange delivery of the fruit via a common carrier. The carrier was 3 days late on the scheduled delivery. The consignee signed for the goods without exception. After reviewing the goods, the consignee determined that the remaining shelf life on the fruit was not long enough. The consignee decided not to send the fruit out to the ultimate customer. The shipper has filed a claim against us and we are intending to deduct the claim against various freight invoices that we owe the common carrier. Who is liable? What is the proper way to deduct the claim?

Answer: As a freight forwarder, you are primarily liable to the shipper under your bill of lading, but you have a cause of action under 49 U.S.C. 14706 (Carmack Amendment) against the carrier responsible for the loss or damage. Note that you should promptly file a claim in writing against the carrier for the amount the shipper has claimed.

You can, if you wish, set off the claim against freight charges owed to the carrier. But first, check the carrier's tariff for a "loss-of-discount" rule for late payments. Be aware that the carrier could bring suit against you for its freight charges, in which case you would have to file a counterclaim for the loss or damage.

278) FREIGHT CLAIMS – LATE DELIVERY

Question: We are a carrier and we contracted a load with a local broker, with the following terms - pick-up 10/6 and deliver 10/7 @9:00am. Unfortunately our company driver fell ill while in transit to the consignee. Sixty days later when inquiring about payment the broker told us there was a pending claim in the amount of $1,250.00. The good news for the broker is that they owed us a total of $3,000.00 for a few other loads and deducted that amount from our settlement. The consignee claims we shut the plant down due to the late delivery. There was no notice to us on a confirmation or even verbal including the bill of lading. What would be the proper procedure from both sides? Can the broker do this?

Answer: Ordinarily, a motor carrier is only required to deliver with "reasonable dispatch". However, it appears that you may have agreed to a specific time for delivery, in which case it could be a breach of the contract of carriage.

As to the damages claimed, unless you were told that late delivery would shut down the plant, these would be consequential or special damages and not generally recoverable.

This, of course, does not prevent the shipper - or the broker - from deducting a claim from the freight charges owed to you. If you really feel it important to collect the charges for this shipment, your recourse is to bring a lawsuit. You can probably do this yourself in Small Claims Court.

279) FREIGHT CLAIMS – LATE NOTICE ON MIS-DELIVERY

Question: On July 30, 2004 we brokered a load to a carrier consisting of two machines (similar in function but different in price) from a manufacturer in Indiana. The machines went to two separate consignees in California. I received a letter today (Dec 19, 2006 - over two years later) from the manufacturer stating that the machines were mis-delivered to their respective consignees. I have no doubt from their documents that they were, but is there not a statute of limitations on this? Both consignees have been using the machines for over two years and now the one consignee wants a brand new machine. Our customer, the manufacturer, wants us to participate in their losses financially. The carrier is denying any responsibility, stating that too much time has passed and there is no longer a valid claim.

It would seem to me that although the driver originally had responsibility, the consignees had 15 days to notice they had the wrong machines and at most 9 months to file a claim. The machines could have easily and inexpensively been transferred if we had been notified in a timely fashion, as they are but 140 miles apart. Do they have a legal case against us as the broker for damages? Do they have a case against the delivering carrier? Or is the statute of limitations up after these 2 years and 4 months?

Answer: There are a number of issues involved here.

1. As a broker, you should not have any liability for the mis-delivery unless it was actually caused by something that you did - i.e., your negligence.

2. The motor carrier would have liability for the mis-delivery, but could have defenses if sued, such as the failure of the shipper and/or consignees to mitigate the loss. In addition, if the shipment moved under a Uniform Straight Bill of Lading, there would be a contractual defense -- the 9-month time limit for filing a claim in writing with the carrier. (Note that if there was no time limit in the carrier's bill of lading and/or tariff, a claim could still be filed, and its validity would be governed by a reasonableness standard.)

3. The statute of limitations for an action by a shipper against a broker is governed by state law and would depend on whether the complaint states a claim for negligence, breach of contract, etc.

4. I find it difficult to believe that the two consignees did not know they had received the wrong shipments and took this long to realize it. Perhaps the manufacturer is focusing on the wrong villain.

280) FREIGHT CLAIMS – LIABILITY AND BURDEN OF PROOF ON DROP SHIPMENTS

Question: Carriers are contracted to cross-dock product, load route trailers and deliver product to dealerships. The routes include delivery during business hours (attended deliveries) and delivery during non business hours (unattended deliveries). The contract does not address the terms of unattended delivery, but the carrier is aware of the type of delivery involved when contract is signed.

Upon delivery the driver signs two copies of the delivery receipt, one is left with the dealer and one is retained by the driver. Dealer is expected to sign the delivery receipt noting any overage, shortage or damage and return it to the carrier at next delivery or by fax within 72 hours, whichever is first.

Reporting has been done to prove that the claim to shipment ratio of the unattended deliveries and attended deliveries is very similar.

In the unattended situation, what is the liability of the carrier? Who has the burden of proof in this type of claim?

Answer: Regarding your question about "unattended delivery", I assume that this problem involves shortages from trailers that are dropped at the consignee's facility for unloading, and that the driver is not present during unloading to verify the count and/or condition of the shipment.

The thing to remember is the claimant's basic burden of proof. The claimant must prove with competent evidence (statement or affidavit from an employee having actual knowledge, shipping documents, loading tallies, etc.) what was actually loaded into the trailer at origin. Likewise, there must be competent proof that there was in fact a shortage at the time the trailer was delivered (and that it did not occur after delivery).

If the trailer was sealed at origin, and is delivered with the origin seal intact, there is a strong presumption that the loss did not occur in transit (unless there is evidence of tampering with the seal, door locks, hinges, etc.)

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.

281) FREIGHT CLAIMS – LIABILITY FOR FLOOD DAMAGE

Question: We are a grocery chain store operation with our own private fleet of tractors and trailers.

We partner with another company who picks up freight at our vendor on their equipment and loads it on to our equipment spotted at their facility. After normal store deliveries we will bring another empty over, pick up the full trailer, and backhaul to our warehouse.

Recently after they completed loading our trailer at their dock a nearby river flooded and washed our trailer into a swamp. Contents were still on the trailer but unsalvageable.

Excluding specific contract clauses limiting liability, is there any general transportation law that would apply to this situation regarding:

The carrier's liability regarding safe custody of our trailer and contents?

The carrier's responsibility to recover our trailer from the swamp?

Answer: An interesting question....

It is not clear whether the other "company who picks up freight at our vendor" is a for-hire carrier, private carrier, or what.

However, it would seem that the transportation service that it contracted to provide had essentially ended once the goods had been transferred into your trailer and were awaiting pickup by your company. If this is so, then the other company probably would no longer have liability as a common carrier, and its liability would be that of a bailee.

As a bailee, the other company would have an obligation to use reasonable care to protect your property that was in its possession (a negligence standard). In other words, you would have to establish that they were negligent in some way in protecting your trailer and the contents. This is a factual determination.

I would suggest that you check both your own insurance coverage and the other company's insurance to see if either policy would cover this loss.

282) FREIGHT CLAIMS – LIABILITY FOR FREIGHT CHARGES

Question: An entire truckload of cargo has been involved in an accident and is a total loss. There is not a dispute about the claim and the carrier's insurance company is planning to make payment for it. However, the carrier has submitted a freight bill to us (we are a broker) and stated that we were still obligated to pay them for the freight even though they hadn't made any of the delivery stops prior to the accident. It has always been my understanding that the carrier should seek to recover the lost expenses for such a claim from their own insurance company and not from the shipper or broker with whom they contracted since the carrier didn't complete any of the contracted work. Please advise.

Answer: As a principle of contract law, if the carrier fails to deliver a shipment, it has breached the contract of carriage and has not earned its freight charges.

Likewise, if there is a partial delivery, and a portion of the shipment is lost or damaged, the claimant will usually be entitled to recover a pro-rata portion of the freight charges (if they were paid) based on the ratio of the weight of the lost or damaged goods to the weight of the total shipment.

From the facts as you have described them, the carrier cannot recover its freight charges from the shipper (or from the broker, if his contract is through a broker).

283) FREIGHT CLAIMS – LIABILITY FOR MIS-DELIVERY

Question: We are an NVOCC and received a shipment from a supplier "A" on a trucker's bill of lading ("B/L") that identified the shipper as the trucking company's name c/o the supplier's name "A". The consignee (destination) showed our company's name and address with no other references. There were no marks or numbers on the B/L or the merchandise indicating any other consignee. There was no additional paper work attached to the shipment. All past shipments we received from this supplier "A" were for one consignee "B". After 3 weeks the said consignee "B" was at our warehouse and identified the shipment as his. We shipped out the cargo to this "B" company. A week after the shipment sailed the supplier "A" notified us that the shipment was for another consignee "C". The consignee "B" who received the merchandise refuses to return it.

Consignee "C" directed supplier "A" to send the merchandise to our company.

We know that consignee "B" is wrong to keep the merchandise but in the mean time who is liable to consignee "C" for the value of the merchandise; the NVOCC or the supplier "A"?

Answer: From your description of the facts, it would appear that "A" (the seller) would be liable to "C" (the buyer) if "C" had paid for the goods and did not receive them, because this would be a breach of the contract of sale between these parties.

"A" will probably claim that your company is liable for any loss it incurs because you delivered the goods to the wrong party, in other words, that you should have checked with "A" for instructions and not just assumed that the shipment was supposed to be delivered to "B".

Ultimately, "B" will have to either return the goods or pay for them, or it will be guilty of conversion.

284) FREIGHT CLAIMS – LIABILITY FOR MISDELIVERY

Question: This question concerns the obligation of carrier's driver to supervise unloading:

A freight forwarder negotiated "hot-shot" exclusive use vehicle for shipment, but the carrier combines the load with other freight. On arrival, the driver borrows consignee's car and leaves "to go get breakfast." After the driver returns the car, he drives away with the equipment and many many miles away gets a call that the wrong freight was unloaded. He must turn around and travel all the way back to deliver the right freight and pick up the wrong freight. All of this results in "hot-shot" load consignee receiving freight days late, instead of required overnight.

The forwarder refuses to pay the rate that was negotiated for "hot-shot" exclusive use vehicle and offers to pay standard LTL rate, which is refused. Carrier sues not only for the negotiated rate, but adds $1000 for having to turn around and go back.

Where can I find authority stating that it was the driver's responsibility to oversee unloading (which would have avoided problem)? (Note: this is not shipper load and count.)

Answer: Normally, I would be tempted to ask "who was supposed to load and/or unload the freight"? For example, if this is a negotiated "contract" movement, you have to look to the agreement between the parties to determine whether the rate includes loading and/or unloading. If it was a common carrier movement using a uniform straight bill of lading, then the classification or the applicable tariff would govern.

However, it is the carrier that has the responsibility to ensure that a proper delivery has been made. Delivering the wrong shipment would constitute a misdelivery and a breach of the contract of carriage. I don't think it should make any difference whether the driver or the consignee unloads the truck.

285) FREIGHT CLAIMS – LIABILITY LIMITATION ON 'USED' MACHINERY

Question: I have an account that shipped out a used computer. Part of it never delivered. The shipper had to purchase new replacement pieces at a cost of $9,500.00. The carrier came back and said they are only going to pay $.10 per lb. because it was used. Aren't they obligated to pay for replacement cost? I could see if the shipment was damaged and they would only pay $.10 per lb., but it never delivered.

Answer: Many of the LTL carriers have tariff limitations of liability for "used" machinery or equipment. If there is an enforceable limitation, it would apply regardless of whether there is loss, damage or delay.

However, there are some basic requirements that determine whether a liability limitation is enforceable. You should check carefully to see what kind of bill of lading was used, whether the bill of lading incorporates by reference the "classifications and tariffs", whether the tariff is applicable to this shipment, what the tariff actually says, and whether there was any choice of rates.

You should also note that if an item has been refurbished or reconditioned to like new condition, the liability limitation for used machinery does not apply.

286) FREIGHT CLAIMS – LIABILITY LIMITATION ON "USED" MACHINERY

Question: We recently filed a loss claim with a large regional LTL carrier for a gearbox that was lost in transit. This unit was purchased new and when we started to install it, we found it to be defective and returned it for warranty evaluation at the manufacturer. The carrier lost the shipment before it reached the manufacturer. The unit was never used, the defect was found before it ever had the power put to it. The value of it was $1,197.00. The carrier paid us $65.00 and then claimed they over paid us and should have paid only $6.50 ($.10/lb) as it was now considered used. I have had a running battle with them for 3 months to no avail; they still claim it to be used. Are they right? Are there any regulations that determine when an item is considered used as opposed to new?

Answer: Since you were dealing with a "large regional LTL carrier", I will assume that this shipment moved under a Uniform Straight Bill of Lading, and that the bill of lading incorporated the carrier's rules tariff that contained various liability limitations. If so, the tariff provisions would probably be binding on the shipper.

As to whether this was "new" or "used", there is no law or regulation that defines these terms. I would certainly agree with you that the usual and common meaning would consider this item as "new" and not "used". As a matter of fact, Roadway Express's tariff 301, Item 3010 provides that "If a the machinery has been set-up for the first time but is not operable, and is being returned to the vendor for repair or exchange, it will not fall under this item and carrier's liability for such return transit will be no greater than the actual value of the machinery in its operable condition."

You need to check your carrier's tariff to determine whether or not it has a similar provision.

287) FREIGHT CLAIMS – LIABILITY LIMITATIONS

Question: We are a local harbor trucking company that delivers sealed ocean containers. Upon delivery to this particular client because of the way their dock is situated, the container doors must be open as the driver backs into their unloading dock, which is on a very steep angle. The back of the container does have a type of fish netting to keep cartons from tumbling to the ground. In this particular instance this netting did not work and cartons fell to the ground and the customer is claiming damage. They said the driver made the truck "jerk" which caused the cartons to fall. We denied liability for the damage on the basis of the position of their dock and that they should have provided load locks to be placed at the door of the container to keep the cartons intact.

The import broker who was to be responsible for paying our trucking charge has debited the claim amount from our trucking invoices. My question is twofold. (1) Can they withhold trucking charges to pay for a freight claim even though we have denied liability? (2) Our delivery invoices also contain a "release valuation" clause which states that unless they declare a greater value, our liability for the merchandise is to be not exceeding $.50 per pound and our liability including negligence is limited to the sum of $50.00 per shipment.

How would we stand on this issue if we take the client to small claims court for withholding payment of freight charges?

Answer: There are a number of issues raised by your questions:

1. It is not "illegal" for a shipper (or its representative such as an "import 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.

2. The next question involves both carrier liability and limitations of liability:

a. The law places a high standard on common carriers, and a carrier will usually be found liable unless it can prove that the loss or damage was caused by an accepted cause such as "the act of default of the shipper" AND that it was free from any negligence that may have caused or contributed to the loss or damage. From your description of the facts, I think you might have difficulty in proving freedom from any negligence.

b. Limitations of liability are generally enforceable IF the carrier has complied with certain minimum requirements. The court decisions usually focus on: (1) whether the carrier has issued a bill of lading that clearly states that there is a liability limitation or otherwise incorporates by reference limitations that are contained in an applicable tariff; (2) whether there is reasonable opportunity to choose between two or more levels of liability, and (3) whether there is a choice of rates for the different levels of liability. It is not clear whether the "release valuation" clause in your delivery invoices would meet these requirements.

288) FREIGHT CLAIMS – LIABILITY LIMITS ON "USED" MERCHANDISE

Question: We are a motor carrier and have a provision in our tariff that releases the value of property to a value not to exceed $.50 per pound when the commodity shipped is used, reconditioned, or refurbished.

A cargo claim was filed with us for damage to a steel mold (NMFC number 104700 class 50). The merchandise was purchased by the claimant. Upon delivery, they made tests on the mold and determined that the specifications on the mold were not correct. As a result, the claimant/consignee returned the mold to the manufacturer to be re-worked. We were the carrier that picked the mold up to be delivered to the manufacturer. In transit, the mold sustained damage apparently by the carrier.

My question is regarding the definition of "used" merchandise. Is there an actual definition of the word "used" in transportation? Can I treat this mold as used and apply our released value as listed in our published Tariff?

Answer: I don't think there is any definition of "used" in any statute or regulation, or for that matter, in the NMFC. My opinion is that under the circumstances you have described, and the commonly understood meaning of the term, the mold would not be considered "used".

If you want a second opinion, you may wish to contact one of the senior classification specialists for the NMFC at the National Motor Freight Traffic Association in Alexandria, Virginia for an opinion:

George M. Beck (703) 838-1813
Daniel E. Horning (703) 838-1820
William F. Mascaro (703) 838-1834
You can also try their website: http://www.nmfta.org

289) FREIGHT CLAIMS – LIMITATIONS OF LIABILITY V. INSURANCE LIMITS

Question: We had a shipment returned to us via common carrier. The shipper had no contract with the carrier involved, and so the carrier tariffs applied. While in transit, actually while in possession of the goods, a fire occurred at one of the carrier's terminals. Our goods were considered a total loss, being electrical in nature, since they were exposed to the elements of fire and water damage in the fire. After negotiating the return value, we were still forced to

wait one year for settlement while the carrier and its insurance provider, took the 9-month claim-filing time period to arrive at total accumulation of the claim values associated with this loss. This we told the carrier was in violation of Federal Law, title 49 CFR Part 370.9, but nothing was paid until about 11 months after the loss occurred.

The carrier sent us a check for 41.26% of our claim value, stating that all claimants received the same percent of claim value as their settlement.

The carrier's tariff reads "in the event of loss or damage to any shipment, carriers liability will not exceed $10 per pound per package, subject to a maximum liability of $100,000 per incident per shipper, unless the shipper has requested excess liability coverage." (emphasis added)

$10 times the weight of our loss would have provided us full coverage of our negotiated claim loss. But, the carrier and or its insurance provider is arguing that their maximum liability is $100,000 per occurrence, period. The carrier has apparently paid only $100,000 for all the claims filed, each claimant receiving 41.26% of its claim value. We have tried to argue that the carrier's tariff is written (no matter its intent) in language that allows liability at $100,000 for each shipper per an occurrence.

Is the carrier correct, or are we? If we are correct, what options do we have to take action against the carrier or its insurance provider?

Answer: You have stated that the carrier's tariff reads "in the event of loss or damage to any shipment, carriers liability will not exceed $10 per pound per package, subject to a maximum liability of $100,000 per incident per shipper, unless the shipper has requested excess liability coverage."

Clearly, the language "per shipper" can only be construed one way - and if your claim does not exceed either the $10 per pound or $100,000 limit, the carrier is liable up to such amounts.

It is apparent that the carrier's insurance policy may have different language and probably a cap on the insurer's liability "per incident". However, that is not your problem – it's the carrier's problem.

This is a perfect example of how folks fail to distinguish between a motor carrier's legal liability for loss or damage, and the coverage it may have (or may NOT have) under its cargo insurance policy.

290) FREIGHT CLAIMS - LOSS AT WAREHOUSE

Question: I need your guidance concerning warehouse liability. We had an inbound private rail car broken into while at a public warehouse location. Since the car was already placed by the railroad no carrier liability is involved. The incident was not discovered until the warehouse was ready to begin unloading the shipment (car was either at the inside warehouse dock or on an outside track on the warehouse premises). Theft of some food product was experienced plus we will want to dump product near the doorway as a safety precaution. Is the warehouse liable for this loss?

Answer: A warehouseman is liable for loss or damage to property in its possession if the loss or damage is caused by or results from its negligence. It is a lesser standard of liability than that which applies to a common carrier. (This is discussed in detail in *Freight Claims in Plain English*, 3rd ed. 1995)

The problem is that you would have to prove that the warehouse was somehow negligent. Factors taken into account in the court decisions usually include a failure to provide adequate security (fencing, locked gates, lighting, guards, etc.) especially if it is a high-risk area, or there has been a history of thefts from the facility.

I suggest that you thoroughly investigate all of the facts and if you feel there was evidence of negligence, file a claim in writing with the warehouse.

Note that a warehouseman can limit its liability, but in order to do this, under the U.C.C. the liability limitation must be in writing (usually in the form of a warehouse receipt).

291) FREIGHT CLAIMS – LOSS ON INTERMODAL SHIPMENT

Question: On 12/9/03, our South Bend, IN warehouse received a 40' container shipment from American Road Line (ARL). At delivery, the driver went to the rear swing doors and removed the seal and handed it to our receiving lead. The seal was not cut but rather just pulled off the doors. Later inspection of the seal revealed that it had been carefully tampered with so that it would appear to be intact yet the integrity of the seal had been broken (we retained the seal).

Once the doors were opened, one of the receiving associates immediately noted that the load appeared to have been tampered with as some of the shrink warp had been pulled from a skid. Inventory of this load then revealed that the above listed product was missing according to the packing slip. Said product was stacked 40 per skid thus one full skid was missing plus 10 cartons from another skid.

We took photos of the load along with digital security pictures of the skids, trailer and driver with a CCTV camera.

Shipment was FOB origin, prepaid. We do not have a relationship with the railroad or the drayage company. We filed a claim with ARL the following day, 12/10/03 for $22,949.50 (full value - what we paid for the product).

The container originated at the vendor's location in Southern California, railed to Chicago and ARL pulled it on 12/8 at 22:47, arrived at our location at 01:57, or 2 hr. and 10 minute trip (w/ time zone change).

We signed the bill of lading as follows:

"B/L #: Seal intact

"Comments: 516 pcs on 13 skids 50 pcs short per packing slip load was tampered w/ found empty skids & loose shrink wrap. Possible theft?"

ARL declined our claim on 3/12/04. "We must respectfully deny your claim. The load arrived at Tech Data, S. Bend, IN with seal number 4339007 intact and signed by the consignee. The same seal number is noted on the outgate receipt. The theft had to occur prior to us taking control of the trailer from Union Pacific Railroad."

What do you recommend that we do next? Attempt to push back on ARL (we have no relationship), file a claim with the UP? We have no leverage with the vendor. We ask them to utilize our carriers, but they control the decision.

Answer: Intermodal shipments pose some difficult problems when the location of the loss or damage cannot be determined. It is unclear as to what shipping arrangements were involved here, and whether there was a "through bill of lading" or multiple contracts of carriage with the different carriers that handled the shipment.

However, there may be a simple solution. For an interstate shipment, the Carmack Amendment (49 U.S.C. 14706) provides that both the receiving and delivering carriers are liable for any loss or damage in transit, and the claimant need not prove where the loss occurred.

Thus, it would appear that you have the right to hold American Road Line liable as the delivering carrier. If they are not the carrier that caused the loss, they have a right to seek indemnification from the carrier that did cause the loss.

292) FREIGHT CLAIMS – LOST AIRLINE LUGGAGE

Question: This question concerns luggage lost by an airline. Our insured lost over $4,000 in personal property and the airline paid only $700 based on their $9.07 per pound limit of liability. My question is...do they owe more? Are cases like this a lost cause?

Are there different limitations for flights within the United States?

Answer: Liability of an air carrier for loss or damage to property on international movements can be governed by the Warsaw Convention (1929), the Montreal Protocol #4 (1955), or the Montreal Convention of 1999, depending on which version has been adopted by both the country of origin and the country of destination.

Under Warsaw the air carrier's liability is limited to $20.00 per kilo or $9.07 per lb.

Under the later versions the liability limitation is 17 SDR's (Special Drawing Rights) per kilo. At the present rate of exchange, one SDR is worth approximately $1.53, so that 17 SDR's would mean a recovery of about $26.00 per kilo or about $11.18 per lb., somewhat more than the Warsaw $20.00 per kilo or $9.07 per lb.

While there are some technical "loopholes" that can sometimes be exploited to avoid the liability limitation in Warsaw, most of these were eliminated in the later versions. Thus, it is most likely that the liability limitation is enforceable.

There are different limitations for domestic air movements.

PASSENGER BAGGAGE: The requirement for filing tariffs for domestic passenger transportation was eliminated by the Airline Deregulation Act of 1978, along with the sunsetting of the Civil Aeronautics Board ("CAB"). Thus passenger fares - and rules relating to checked baggage - are not filed with the Department of Transportation. However, some of the former CAB regulations have continued in effect and govern passenger tickets used by the domestic airlines. Specifically, 14 CFR § 254, deals with "Domestic Baggage Liability", and provides that:

> . . . an air carrier shall not limit its liability for provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property, including baggage, in its custody to an amount less than $2,500 for each passenger.

AIR FREIGHT: Unless a higher value is declared on the air waybill, most all domestic air carriers have published tariff rules limiting the carrier's liability to $.50 per pound based on the weight of the piece(s) delayed, lost, damaged or destroyed, subject to a minimum of $50 per shipment. The tariffs typically provide for a valuation charge of $.50 per $100 of excess value. In addition, a number of the carriers (e.g., Continental, TWA, U.S. Air) also have an "average declared value" rule. There are significant variations from one airline to another, and the individual tariffs must be consulted.

293) FREIGHT CLAIMS – LOST PALLETS

Question: We have a customer that we haul freight for, they have a customer that pays them. We have no pallet agreement with either party, but the customer we haul freight for does have an agreement with their customer. We told the first party that we would not sign any paperwork for returning pallets. The second party has somehow lost 8000 pallets and deducted it from the first party's money and now our customer is holding $16,000.00 of our freight payment for the lost pallets. They have never filed a claim and we have no contract concerning pallets. Is this legal?

Answer: If I understand your question, your company is a motor carrier that transported palletized freight from your shipper-customer to its consignee-customer. I assume the freight was delivered on the pallets and that the consignee-customer received and signed for the freight. Apparently, you did not pick up or attempt to return any of the pallets.

If so, I cannot see any reason why your company should be responsible for the pallets that were "lost" by the consignee-customer. Your liability for loss or damage to the freight - and the pallets - ends when delivery is made to the consignee-customer.

You also mention that no claim has been filed. A claim for loss or damage must be filed in writing, and must be filed within the time limit specified in the bill of lading and/or applicable tariffs - this is usually 9 months from the date of delivery.

I really don't understand why your shipper-customer is withholding payment of freight charges. However, you should make a written demand for payment, stating the relevant facts. If this fails, your recourse may be a lawsuit for the collection of your charges.

294) FREIGHT CLAIMS – MEASURE OF DAMAGES – "HANDLING" CHARGES

Question: If a freight claim is filed, where a shipper or 3rd party charges the customer more for freight charges then the actual charges they incurred, what amount should the carrier reimburse to the shipper/3rd party? Some are just listed as "freight charges" on the invoice and others have "freight & handling". We see anywhere from a 10% to a 200% markup.

Answer: The fact that the seller may have inflated actual freight charges in its invoice to the purchaser does not affect the liability of the carrier. The most that the carrier would have to pay, as part of a freight claim, is the amount of the actual freight charges that it received.

295) FREIGHT CLAIMS – MEASURE OF DAMAGES – ADMINISTRATIVE COSTS

Question: When we file a freight claim with a carrier, can we legally add a "filing fee" of $30 to the claim? Does it have to be visible or can we hide it in the claim amount?

What are the legalities around hiding the $30 fee in the cost of the product being claimed? What if we just up the cost by $30 and not tell the carrier?

Answer: This question comes up from time to time. Shippers often try to add an "administrative fee" or equivalent to claims on the theory that it is a reasonable and necessary expense arising out of the loss or damage caused by the carrier.

Most carriers will not pay such additional amounts.

About the only way you can recover the costs of preparing and filing claims would be to include a provision in a written transportation contract.

Normally, the carrier will ask for proof as to the measure of damages - and the usual proof is the seller's invoice to the buyer. I would not recommend that you alter or falsify any such document.

I note that you mention "cost of the product". If you are the seller-shipper of goods that have been sold and the loss/damage occurs while the goods are being transported to your customer, you should be claiming your invoice price to the customer, and not your cost of the goods. If you are the buyer-consignee of the goods, then your cost (the seller's invoice to you) is normally the proper measure of damage.

296) FREIGHT CLAIMS – MEASURE OF DAMAGES – COST OF SURVEY

Question: Whenever we submit a claim for loss or damage on an export shipment, we include the cost of the independent survey. Carriers decline the survey cost stating, "We did not authorize the survey". While this is true, our company requires that a survey be conducted on any loss/damage when the value exceeds $2,500.00 and so we provide a copy of that survey to the carrier to assist with the claim settlement.

Questions: Is there any requirement that a) the carrier be required to consider the cost of the survey and therefore be responsible for its payment? b) if the carrier(s) do not pay for the survey, then is it acceptable to not enclose a copy of that survey with the claim?

Answer: I don't think there is any "legal" answer to your question.

While it is true that reasonable expenses incurred in mitigating a loss can be included in a cargo claim, the cost of an independent survey does not necessarily fall within this category.

One thing that you might do is to notify the carrier in advance that you intend to conduct a survey at a particular time and place, invite them to participate in a joint survey, and ask them to at least share the cost.

As to your second question, it would be my assumption that it is to your benefit to include a copy of the survey with your claim, whether or not the carrier agrees to pay some or all of the cost of the survey.

297) FREIGHT CLAIMS – MEASURE OF DAMAGES – DELAY

Question: A LTL carrier accepted a shipment from the public warehouse we utilize in Memphis TN of an agricultural insecticide for overnight delivery to our customer in Greenwood MS. When the carrier transported our shipment to their Memphis sorting terminal, the shipment was held by the carrier due to "the misinterpretation of the hazardous materials regulations" by the carrier. The origin warehouse was notified and faxed a copy of the applicable MSDS to the carrier. The shipment was cleared by the carrier and was scheduled to be transported that same day. However, due to some mix-up on the carrier's part, our shipment remained on their loading dock. The carrier never notified the shipper about the delay in transit. In any event, the shipment was not delivered to our customer as the customer had requested (overnight delivery). We, in turn, lost the sale as the consignee cancelled the order due to the delay in transit. Our claim is for our loss of sale.

The bill of lading did not "clearly spell out the potential impact of damage" should the shipment not be delivered overnight.

Our contention is this: this carrier has been transporting agricultural chemicals in this region for years and is fully aware of the potential "harm" that may be the result of a late delivery to the consignee; a consequence obvious due to the nature of the shipment. We think that the consequences (delay in delivery) of the carrier's act were foreseeable at the time of the contract of carriage. Even the carrier's sales reps emphasize the reliability of their overnight service within this Memphis/Mississippi region. Our position is that the carrier should reasonably have contemplated that such a delay could cause a failure to reach an advantageous market. This in itself would seem to be "usual and foreseeable damages" and thus be considered "general damages". Of course, the carrier considers our claim for loss of sale to be "special damages" and therefore not recoverable.

Do we have recourse here or does such "potential" harm/damage have to be clearly indicated on the bill of lading in order to be considered "special damages"?

Answer: You have correctly identified the issues as to whether the loss of sale due to the delay would be considered "special" damages, and whether they would or would not be recoverable. To be recoverable, special damages resulting from delay must be foreseeable and usually there must be either actual or constructive notice as to the consequences of the delay. Here you have overnight service requested, and a carrier that presumably knows this particular business, but there was no specific notice and there is only a one day delay.

From your description of the facts, I would seriously question why the consignee refused a shipment that was only one day late. I would say this is a marginal case.

298) FREIGHT CLAIMS – MEASURE OF DAMAGES – FREIGHT CHARGES

Question: When a shipper bills a customer for freight charges on the invoice, but bills them less than what they were charged by the freight company, which amount would be recoverable to the shipper in a freight claim; the amount they charged their customer or the amount the freight company charged them?

For example, the freight company bills the shipper $50 in freight charges. The shipper bills their customer on the invoice for the cost of the product plus $25.00 in freight charges. Which amount of freight charges would be recoverable to the shipper?

Same scenario, but if the shipper was to bill the customer more in freight charges than what they were charged, which amount would be recoverable?

For example, the freight company bills the shipper $50 in freight charges. The shipper bills their customer on the invoice for the cost of the product plus $200.00 in freight charges. Which amount of freight charges would be recoverable? to the shipper?

Answer: In a proper case, freight charges may be recovered as part of a claim for loss or damage to goods in transit. Obviously, the amount claimed would be the amount shown on the carrier's freight bill and actually paid to the carrier.

The fact that a shipper-seller may charge a consignee-buyer more or less that the actual freight charges is irrelevant.

299) FREIGHT CLAIMS – MEASURE OF DAMAGES – FREIGHT CHARGES

Question: When filing a freight claim can we file for the original freight charges paid to the carrier?

Answer: If the shipper has paid the freight charges and there is a non-delivery or substantial damage, the shipper can recover the freight charges on the theory that the carrier did not perform the contract of carriage (breach of contract). If there is a partial loss or damage, the shipper can recover the pro-rata portion of the freight charges that have been paid that are attributable to the portion of the shipment that is lost or damaged.

However, freight charges can't be recovered twice. If a claim is based on a delivered price (invoice to the consignee), then that delivered price presumably includes the transportation charges, and they cannot be separately recovered.

300) FREIGHT CLAIMS – MEASURE OF DAMAGES – FREIGHT COSTS

Question: When processing a claim, can I add to the claim the cost of the freight bill if it has been already been paid?

Answer: It depends on the measure of damages that you have used in filing your claim.

Assuming that the goods were lost or substantially damaged in transit:

1. If your claim is for the full invoice amount for goods as delivered to your customer, that would presumably already include the cost of delivering the goods, so you can't recover twice for the freight charges.
2. If your claim is based on the origin value of the goods and the freight charges have been paid, then you can recover the freight charges.

301) FREIGHT CLAIMS – MEASURE OF DAMAGES – INVOICE OR REPLACEMENT COST

Question: Carriers require us to submit a copy of the manufacturer's invoice to show our cost of an item we sold to a customer, unless we can prove that there was a lost sale, when there is a loss or damage.

Before you say we should file for the sell price to our customer if the goods are being transported to the customer by the carrier, a lost sale is difficult to prove to a carrier. So validate the following:

1) When product is inbound for our inventory or sold at cost to a branch and there is a loss or damage, then we file for cost proving cost with a manufacture's invoice.

2) If product is sold to a customer and while a carrier is transporting the goods there is a loss or damage, we should file with the carrier for the sell price to the customer, not our cost. We should not have to prove lost sale to the carrier??

Answer: Let me answer your questions in reverse order.

1. Where goods have been sold to a customer, and are lost of destroyed in transit, the proper measure of damages is the invoice price to the customer, and not the "manufacturing cost" or "replacement cost". This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.3.

A recent case discussing the question of measure of damages is *Custom Cartage, Inc. v. Motorola*, Inc., No. 98C5182, 1999 WL 965686 (N.D. Ill. Oct. 15, 1999), in which the Court stated:

> d. Invoice value as Measure of Damages
>
> Finally, J & P argues that the invoice value of the cellular phones is not the proper valuation of the loss, but that the production costs are the proper measure of damages. Under the Carmack Amendment, absent any limitation on liability, Defendants' Motorola and TCS may recover for "actual loss." See 49 U.S.C. §14706(a)(1). "Actual loss" is measured by the market value of the goods at destination. See, e.g., G*ordon v. United Van Lines, Inc*., 130 F.3d 282, 287-88 (7th Cir.1997); *Polaroid Corp. v. Schuster's Express, Inc.*, 484 F.2d 349 (1st Cir.1973). J & P argues that the measure of damages should be production costs, which is similar to replacements costs. Another measure of damages other than market value may be used if for special reasons market value is not exact or otherwise not applicable. See *Eastman Kodak Co. v. Westway Motor Freight, Inc*., 949 F.2d 317, 319 (10th Cir.1991). It is incumbent on the carrier to show that the market value rule will not result in a just measure of actual damages. See id.
>
> However, J & P has not demonstrated that the market value rule should not be applied. Courts have held that "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 had been performed.'" *Polaroid Corp.*, 484 F .2d at 351. J & P argues that because Motorola is not the sole producer of cellular phones and Motorola's cellular phones are not unique goods, the better measure of damages would be production or replacement costs. The Court is not convinced that the market value rule should be thrown out any time the lost shipment is a product that is not unique or produced by more than one manufacturer. The court in *Polaroid*, declined to measure damages by replacement costs because the lost shipment consisted of goods in great demand. See id. at 352. Here, Motorola's cellular phones can likely also be considered goods in great demand, and the market value rule could be applicable. Moreover, the invoice value could serve as the proper measure of market value.
>
> *18 Thus, the Court denies J & P summary judgment on its motion claiming that the invoice costs cannot be the proper measure of damages and rather that the production costs are the proper measure of damages.

2. If the goods are lost on an inbound shipment, the consignee's measure of damage is its cost (as shown on the vendor's invoice to the consignee).

3. If the goods are lost on a "warehouse to warehouse" move or similar stock-transfer situation, then the real question is whether the claimant could prove that this item would have been sold to another customer or whether it would be "speculative" that there would be an immediate buyer. Such proof might include evidence of the shipper's records showing the rate of inventory turnover for that product, etc. This was a key issue in the *Polaroid* and *Eastman Kodak* cases - discussed at Section 7.2.7 in *Freight Claims in Plain English* (3rd Ed. 1995). If so, the claimant should be entitled to its selling price, less any expenses not incurred (such as sales commissions). On the other hand, if the item would merely have been put back into inventory, with no guarantee that it would be promptly sold, then the inventory value or cost basis would be the proper measure of damage. It should also be noted that it is the carrier that has the burden of proving that the shipper did not lose any sales. *Robert Burton Associates, Ltd. v. Preston Trucking Co.,* 149 F.3d 218 (1998), aff'd on reh. (D.NJ May 22, 1997, reversed in part and remanded, 1998 WL 381711 (3d Cir. 1998).

302) FREIGHT CLAIMS – MEASURE OF DAMAGES – MANUFACTURER'S COST

Question: I am trying to resolve a claim with our customer relating to a contractual agreement where the measure of loss is stated as "Manufacture's Cost". Unfortunately, there are differences of opinion as to what financial elements are considered Manufacture's Cost.

The detail of the claim is as follows:

1.) The shipper who manufactured the product in Pakistan is not the customer who suffered the loss.

2.) The shipper in Pakistan invoiced and sold the product to our customer in the United States. The manufacture affixes our customer's to the finished product.

3.) The product reached the Port of Long Beach, CA, picked-up by the drayman and thereafter stolen while in their possession.

The claim as presented entails the following percentages:

* Manufacture's commercial invoices = 58%
* Ocean freight, taxes and duties = 17%
* Customer's foreign and domestic operations expense = 25%

If possible, please provide an answer as to the definition of Manufacture's Cost and what you feel the measure of loss would be in this case.

Answer: There is really no clear legal answer to this question and the court decisions dealing with the measure of damages on import shipments are really not on point when you have a contract that specifies a particular measure.

Ordinarily, on an ocean shipment moving under a through bill of lading, if the consignee had already contracted to sell the goods to a third party, it might be able to recover its contract selling price.

If the goods had not been sold, then the consignee would usually be entitled to its "landed cost" - the seller's invoice price plus the freight charges and any customs duty, etc. that was actually paid. This would be equivalent to the first two items you mention:

* Manufacture's commercial invoices
* Ocean freight, taxes and duties

The third item (Customer's foreign and domestic operations expense) is less clear: it is not directly related to the loss or damage to the goods, and I would question whether this is properly includable.

303) FREIGHT CLAIMS – MEASURE OF DAMAGES – RIGGING COSTS

Question: I have a question that should be simple, but probably isn't: Can a shipper file a claim for the complete loss of a machine, while the consignee file for the freight charges both ways (since it went collect) and for the rigging costs to get the machine up righted, unloaded, and then loaded on to the truck after inspection to get it back to the supplier (shipper)?

I own the Q&A in Plain English - Book II and question number 51 appears similar, but don't know if it applies as above. I have a hard time understanding that both parties had actual losses due to the carrier's negligence, but only one can get reimbursed.

Also, in the same book and number 128 it discusses the same issue, but this wasn't the "destination market value" because it went collect.

I appreciate your help and answer to this for our customer's sake.

Answer: The usual measure of damages for loss or damage is the "destination market value" of the goods. If the invoice price is a "delivered" price that includes the freight charges to ship the goods to the customer, that is generally used as the destination market value. If the invoice price does not include freight charges to deliver the goods, and the freight charges are paid (either by the shipper or the consignee), then the freight charges can be added (FOB origin price plus freight).

The additional expenses that you have mentioned (rigging costs to get the machine uprighted, unloaded, and then loaded on to the truck after inspection to get it back to the supplier, freight charges to return the machine, etc.) would probably be considered "special damages" by the carrier.

These "special damage" expenses might be recoverable if they are considered reasonable costs in an attempt to mitigate the loss. However this raises the question of "reasonableness", i.e., was there some reasonable likelihood that the machine could be repaired, refurbished or salvaged for parts if it was returned to the shipper that would justify the additional expenses. You have not indicated if the machine was repaired, or whether there was any salvage - which would be an important factor in determining reasonableness.

In any event, it would be a better practice for only one party - shipper OR consignee (not both) - to file the claim with the carrier. If the shipper files the claim, it would include the freight charges and other expenses as the agent of the consignee that paid them.

304) FREIGHT CLAIMS – MEASURE OF DAMAGES – SPECIAL DAMAGES

Question: My company recently suffered a considerable loss when a piece of manufacturing equipment was damaged by the carrier called to return the equipment to our factory after repair. The machine being shipped was part of an integrated manufacturing line. While the machine was under repair we were unable to produce goods for delivery to our customer. The potential penalty for causing a shutdown to our customer would have been approximately $4,000,000 per hour!

After sending the machine to the manufacturer by dedicated truck and having repairs done overnight, we contacted a major airfreight company to return the machine, by air, to our site. At the same time, the manufacturer had dispatched service people to uncrate and install the machine upon arrival.

The expediter picked up the freight by truck and carried it to the airport for loading onto the plane. At the airport, the carrier was unable to load the freight onto the plane due to its weight. The weight had been over-estimated by the shipper, but even after weighing the freight and finding out it was in fact half of the weight on the bill of lading, the carrier still was unable to load the freight on the plane. Upon taking the load back to the expediter's warehouse for

repackaging, the truck was involved in a traffic accident and the freight was overturned, causing the damage.

The cost to repair damages to the machine was over $5,000.00, which I am confident we will be able to recover. The major loss, however, was due to the delay in return of the machine due to having to send it back to the manufacturer to repair the freight damage.

When after determining that they would be unable to load the machine onto their aircraft, we called another carrier, which was able to get a plane that could carry the machine. However, once the machine was damaged the second carrier was asked to wait until it could be determined if the damages could be immediately repaired. At that point, the service people dispatched for installation were at our facility waiting for the machine to arrive. When it was learned that the repair would take twelve to eighteen hours, the plane was released and the service people were told to go check in to a hotel and stay by the phone.

The carrier that caused the damage has since submitted an invoice for $7,000 for a load which they returned to the original pick up location.

In addition, we were forced to use alternative manufacturing methods which caused us over $20,000 in additional scrap.

My question is, what in addition to the $5,000 damage to the machine can I recover? What about the $10,000 it cost to get the second plane which we ended up not being able to use? How about the $7,000 in additional labor for having service people waiting for almost twenty-four hours? What about the $20,000 in scrap incurred due to the delay in getting the machine repaired a second time? What about travel expenses for sending someone to inspect the damage and coordinate the second expedited delivery? What about the $7,000 that the damaging carrier wants to charge me for a delivery they never completed?

Answer: You have a classic case of the "special damages" problem; see Section 7.3 in "*Freight Claims in Plain English*" (3rd Ed. 1995) ("FCIPE").

The basic issue in determining what monetary damages are recoverable is whether the consequences of the carrier's acts (damage or delay to the shipment) are FORSEEABLE at the time of the contract of carriage. Thus, some consequences may be obvious due to the nature of the shipment, but others would not be known to the carrier unless there was some actual notice. Unless you clearly spelled out the potential impact of damage to your machine, or a delay in returning it to service, the first airfreight carrier probably would not be liable for the most of the costs and expenses which you incurred. On the other hand, if the carrier had been fully apprised of the consequences of damage or delay, it could be liable for at least some of the expenses. I would suggest that you read the *Marjan* case, which is reproduced in Appendix 115 of FCIPE, and which illustrates when special damages can be recovered.

There is no question that you should recover the $5,000 cost of repairing the machine that was damaged when the truck was in the accident. And, I don't think you should have to pay the carrier's $7,000 invoice for its freight charges, since it clearly never performed its contract. As to any additional costs or expenses, we would have to know exactly what notice was given to the carrier at the time you contracted for their services.

305) FREIGHT CLAIMS – MEASURE OF DAMAGES AND SALVAGE

Question: We shipped 4-5 boxcars of rice product from our plant in Tennessee to another facility of ours in New Jersey. During the past 6 months, we have been incurring product damages from 60-100 bales of rice per boxcar. This damage is being caused by the railroad.

Below are a few questions on this matter that I would need your assistance on:

A. Can we file a damage claim against the railroad at our manufacturer's cost and still recoup our damaged product?

B. Do we have to give this damaged product back to the railroad if we file a damage claim against the railroad at our retail cost?

C. Can we recoup our damage product and still charge the railroad for the following charges:

1. Labor cost for resorting the entire boxcar?

2. Charges for recouping supplies and labor cost to repack our damaged product?

3. Freight charges to transport our damaged product for recouping to another (State) location?

Answer: Your questions involve the measure of damage and salvage issues.

1. If you file a claim for the value of the damaged goods (either your cost or your invoice value) and the carrier pays you for the full value of the goods, then the carrier is usually entitled to take possession of the damaged goods, salvage them, and retain the proceeds. An exception to this general rule would be food, drugs, or sensitive items that must be destroyed if there is possible contamination, etc. or some other reason why the distressed goods cannot be allowed to enter the stream of commerce.

2. If you retain possession of the damaged goods and salvage them (inspect, segregate, repackage, etc.), then you should give the carrier a credit for the net amount of the salvage proceeds against your claim for the full value of the goods.

3. The measure of damage is a different issue. If goods have been sold to a customer and are damaged in transit, then the usual measure of damage is the invoice price to the customer. On the other hand, if this is a warehouse-to-warehouse move, then your cost or inventory value may be the appropriate measure, unless you can prove that there is a reasonable certainty the goods would have been promptly sold to a customer if they had been delivered. (See *Freight Claims in Plain English*, 3rd Ed. 1995 at Section 7.2.7.)

306) FREIGHT CLAIMS – MEASURE OF DAMAGES IF WARRANTY VOIDED

Question: I am trying to find out how the impact on a product warranty affects freight claims; specifically, can a customer or consignee decline accepting and repairing a machine if the manufacturer states that the damage, even after repair, would nullify the manufacturer's warranty? This is a machine that cost $420,000 and the repair cost $80,000.

Would the consignee be made whole by:

1. replacement of the machine?
2. value of the machine, less salvage?
3. repair cost?

Answer: I don't think there are any court decisions that deal specifically with this question.

Since there is a general duty to "mitigate the loss", I would recommend that the customer accept the machine and have it properly repaired. Then a claim should be filed for the cost of repair and associated expenses, plus an amount that reflects the value of the manufacturer's warranty.

I would note that most manufacturers take into account the cost of supporting their product warranties, and add this into their selling price, so the manufacturer should be able to provide this information.

307) FREIGHT CLAIMS – MEASURE OF DAMAGES ON CROSSED SHIPMENTS

Question: We tendered two shipments to our carrier on the same day. The freight was crossed at the origin terminal. Consignee number #1 received a drum labeled for consignee #2 and consignee #2 received the drum labeled for consignee #1. Consignee #2 realized the difference in the name of the product, but just thought we had changed the name. After they

began experiencing problems in their process they inspected the drum and noticed the labels, address tag, etc. with consignee #1. They notified us and we contacted consignee #1 and they did have the drum belonging to #2. They had not used any of the product from that drum, so we had it shipped to the correct location. What is the carrier's liability in this situation? Both consignees signed the delivery receipts clear. Consignee #2 wants to file a claim for clean-out, lost time, etc.

Answer: Clearly there is a mis-delivery, and the carrier is liable.

The question is the measure of damages. Normally a carrier is responsible for the value of the goods that are lost or damaged. As a general rule, consequential or special damages are not recoverable unless the carrier has actual or constructive notice of the consequences of a mis-delivery at the time it receives the goods for transportation, see *Freight Claims in Plain English* (3rd ed. 1995) at Section 7.3.

Your situation is similar to the facts in *Marquette Cement Mfg. Co. v. Louisville & Nashville R.R. Co.*, 281 F.Supp. 944, aff'd, per curiam 406 F.2d 731 (6th. Cir. 1969), in which recovery for "special damages" was not allowed. This case concerned the mis-delivery by a rail carrier of a carload of cement. Because the cement was delivered to the wrong job site and used for purposes for which it was not correctly mixed, plaintiffs incurred costs in replacing concrete work made with the cement. The district court was called upon to decide whether the correct measure of the rail carrier's damages was the value of a carload of cement or the much higher cost to replace the finished cement work. The court held that the costs of testing and replacing the defective cement were not foreseeable at the time the contract of carriage was created, were not conveyed to the carrier by mere descriptions of the goods on the bill of lading and were therefore not compensable damages.

Thus, although the carrier is liable for the mis-delivery, its liability most likely would be limited to the value (invoice price) of the product.

308) FREIGHT CLAIMS – MEASURE OF DAMAGES ON DUPLICATE SHIPMENT

Question: We made a shipment from one of our customers that was refused by the consignee because it was a duplicate shipment that it did not order. The shipment was damaged while in the possession of the delivering carrier. The shipment was returned to the shipper but it could not be used anymore. We paid the claim based on the invoice cost to destination. The delivering carrier wants to pay at manufacturer's cost because it was the shipper's fault it was shipped out to begin with, being a duplicate shipment and therefore there was no loss to the shipper. Is there any case law or reference you may have to dispute what they are asking for?

Answer: Ordinarily, where goods have been sold to a customer and are lost or damaged in transit, the measure of damages is the invoice price to the customer (less any salvage, etc.).

These goods apparently were not sold, and were inadvertently shipped out, only to be returned to the seller. Thus it is arguable that the seller's inventory value would be a proper measure of damage.

On the other hand, if the seller can establish that there is a ready market for the goods, and that there is a reasonable certainty that they would be sold to another customer within a short time, the seller may be entitled to its selling price less any expenses not incurred by reason of the non-delivery of the product. See *Polaroid Corp. v. Shuster's Express, Inc.*, 484 F.2d 349 (1st Cir. 1973); *Eastman Kodak Co. v. Westway Motor Freight, Inc.*, 949 F.2d 317 (10th Cir. 1991); *Philips Consumer Electronics Co. v. Arrow Carrier Corp.*, 785 F.Supp. 436 (S.D. N.Y. 1992) and discussion in "Freight Claims in Plain English" (3rd Ed. 1995) at Section 7.2.7.

309) FREIGHT CLAIMS – MEASURE OF DAMAGES ON INTRA-COMPANY MOVE

Question: Our shipper had a plant to warehouse move of frozen product. The carrier had an accident, resulting in full loss of the load. Our shipper is submitting a claim for retail cost. Our shipper also states that they should make a profit and feels that they should not mitigate for replacement cost. Can the shipper submit a claim for retail cost in a warehouse-to-warehouse move for retail cost of unsold product? I would think not, being that the bill of lading ("B/L") didn't state the cargo was not tendered showing the consignee being the end user. This occurred in the state of Georgia.

Answer: Ordinarily, where goods have been sold to a customer and are lost or damaged in transit, the measure of damages is the invoice price to the customer (less any salvage, etc.).

These goods apparently were not sold, but were moving "plant to warehouse". Thus it is arguable that the seller's inventory value would be a proper measure of damage.

On the other hand, if the seller can establish that there is a ready market for the goods, and that there is a reasonable certainty that they would be sold to another customer within a short time, the seller may be entitled to its selling price less any expenses not incurred by reason of the non-delivery of the product. See *Polaroid Corp. v. Shuster's Express*, Inc. 484 F.2d 349 (1st Cir. 1973); *Eastman Kodak Co. v. Westway Motor Freight, Inc.*, 949 F.2d 317 (10th Cir. 1991); *Philips Consumer Electronics Co. v. Arrow Carrier Corp.*, 785 F.Supp. 436 (S.D. N.Y. 1992) and discussion in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.7.

310) FREIGHT CLAIMS – MEASURE OF DAMAGES ON LOST RETURN SHIPMENT

Question: A shipment moved from a manufacturing facility to a customer. After a period of a couple of days the customer decided it was the wrong product and obtained credit from the shipper for the original invoice price of the goods. This shipment was returned via another carrier and the product was lost. A claim was filed for the original invoice price that they charged the customer. At this point the carrier is asking that the claim be amended to the manufacturing or inventory cost excluding profit. This product was sent to a central return goods center. From there, if this product weren't lost it would have been returned to the manufacturing plant that had originally shipped the goods from where this product would then have been shipped out to another customer when an order came in. What is the correct measure of damages, the original invoice price or the manufactured cost?

Answer: The real question is whether the claimant could prove that this item would have been sold to another customer or whether it would be "speculative" that there would be an immediate buyer. This was a key issue in the *Polaroid* and *Eastman Kodak* cases - discussed at Section 7.2.7 in *Freight Claims in Plain English* (3rd Ed. 1995). If it could be promptly sold, the claimant should be entitled to its selling price, less any expenses not incurred (such as sales commissions).

On the other hand, if the item would merely have been put back into inventory, with no guarantee that it would be promptly sold, then the inventory value or cost basis would be the proper measure of damage.

311) FREIGHT CLAIMS - MEASURE OF DAMAGES ON RETURNS

Question: We are a 3PL for an auto parts manufacturer managing cargo claims.

We manage cargo claims for shipments from our customer (auto parts manufacturer) to dealers. Measure of damage is invoice price to dealer.

We've been asked to manage cargo claims on shipments moving from the dealer back to our customer. The parts being returned are not damaged parts, but product that the dealer doesn't

want because of overstock, or cancelled sale, etc. When the parts are arrive at our customer's facility, it credits the dealer the original invoice cost plus it pays freight charges on the return shipment. If the product is damaged by the carrier on the return, the manufacturer files the claim with the carrier through us.

If the product is damaged by a carrier on this move, what is the measure of damage?

Answer: Good question.

I assume that the manufacturer assumes risk of loss on the return shipments and is therefore the party to file the claim. Thus, even if the goods were damaged or destroyed on the return trip, the manufacturer would still have to pay (or credit) the amount of the original invoice price to its customer, and pay the freight charges to the carrier. Essentially it would be the same as a sale of goods from the customer back to the manufacturer, with freight collect.

312) FREIGHT CLAIMS - MEASURE OF DAMAGES

Question: I am handling a cargo loss involving the theft of a load of alcoholic beverages. This was a house to house or internal (warehouse to warehouse) movement. The shipper has filed a claim for the full value of the load which includes taxes (excise & liquor) which are more than double the alleged cost of materials, as well as overhead charges and co-packer fees, which are also over twice the amount of the claimed material costs. This is being handled under a Broad Form 15 MTC policy. Would Underwriters owe the taxes and overhead charges simply because the shipper is the parent company of the distillery/brewery?

Answer: I am reluctant to try to answer your question without reviewing the language of the insurance policy.

However, as a general rule in transportation loss/damage cases, the measure of damages is the "destination market value" of the goods. If the shipper has actually incurred the various expenses that you have described (excise & liquor taxes, overhead charges, co-packer fees, etc.) it would seem to me that they should be includable in its damages.

You state that the goods were stolen. I would note that if the goods had been destroyed, and if some of the taxes could be recovered from the taxing authority upon proof thereof, then the shipper could have a duty to mitigate the claim by that amount.

I would suggest that you consult with counsel on this.

313) FREIGHT CLAIMS - MEASURE OF DAMAGES

Question: On February 10th our company shipped ten refrigerators, two of which were refused by the consignee for damage. They were brought back to our warehouse at which time we began incurring storage fees as well as a one time in and out fee for each unit. On April 21st the carrier requested these units for salvage. Unfortunately our warehouse was unable to locate them. On September 22nd these units were sold as damaged units. We have amended our claim to reflect the amount that the units were sold for, leaving only the difference between the original invoice and what they were sold for as damaged. We also filed for the freight charges, the seven months of storage and the one time in and out fees. The carrier came back and responded to our amended claim with "only willing to pay 50% of the invoice value" plus the freight, which leaves a $125 gap. Also, they are unwilling to pay the storage fees or the in and out fee. What are we entitled to?

Answer: While the facts are not entirely clear, it would appear that the carrier would be liable for the value of the damaged goods, less the net proceeds of the salvage.

The "storage" fees are another question, as it appears that the storage may not have been due to the fault of the carrier.

314) FREIGHT CLAIMS – MEASURE OF DAMAGES

Question: On a recent produce delivery to Jacksonville, Florida the load was rejected by the receiver when the temperature recorder showed an increase to 46 degrees for a three hour period during the trip. They insist on no more than 40 degrees. The shipper has billed us for the amount they would have received from their customer had the shipment been accepted. The replacement cost of this shipment is 1,200.00 dollars less than that amount. We accept responsibility for the rejection, but feel we should be required to pay only replacement costs.

Answer: Where goods have been sold to a customer, and are lost of destroyed in transit, the proper measure of damages is the invoice price to the customer, and not the "manufacturing cost" or "replacement cost". This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.3. For more current cases, see *Transportation, Logistics and the Law* (2001), pp.109-11, 115, 182-183, 193-194.

315) FREIGHT CLAIMS – MEASURE OF DAMAGES

Question: A carrier delivered five pallets of badly damaged (crushed, jabbed, smashed) board games to our loading area on 10/20/2003. My claim was acknowledged 10/29/2003. The Bill of Lading is a "Uniform Domestic Straight Bill of Lading" with no exceptions noted and no damage noted. The inspector sent by the carrier sees the damage in the same light as I do.

It is too late to sell the games during this business cycle, even if I had some to sell. I cannot fill my orders and was forced to cancel for the holiday season. I have a large investment and will have no game revenue for the foreseeable future.

Q. Do I have the right to charge wholesale price for the trashed pallets of games?

Q. How much storage can I charge? Our loading area is really not for rent.

Answer: I assume that you were the consignee of the shipment of board games, and that you had risk of loss in transit so that you had to pay the shipper/seller for the goods even though they were damaged.

If the goods were substantially damaged so as to be essentially worthless and not saleable, then you should file a claim for the invoice amount from the seller.

If some portion of the goods can be salvaged, then you would have a duty to "mitigate the loss" and should deduct the value of the salvaged goods from your claim.

316) FREIGHT CLAIMS – MEASURE OF DAMAGES

Question: A farm implement dealer purchased a tractor from the manufacturer, terms FOB origin. The carrier ran into a bridge overpass and the tractor cab was ripped off of the tractor. A claim was filed for the cost that the dealer paid less salvage amount. The insurance company will only pay the cost for repair. The dealer claims he cannot sell the unit as a new unit and will lose about $10,000 if he accepts only the repair cost.

Is the carrier only liable for the cost to repair?

Answer: I would think that the proper measure of damages in this case is:

1. The cost of repair (reasonable and necessary expense incurred in mitigation of the loss), and

2. If the dealer can establish that it had a buyer for the tractor or there was a reasonable certainty that the tractor would have been sold within a short period of time, it may be entitled to additional damages. This would be based on the difference between the usual selling price of the tractor less its value as a repaired machine (the diminution in destination market value of the tractor). This could be determined either by expert testimony as to the value or by actual sale of the repaired tractor.

I would note that the subject of damages is covered extensively in *Freight Claims in Plain English* (3rd ed. 1995) at Section 7.0.

317) FREIGHT CLAIMS – MEASURE OF DAMAGES

Question: I have had a few motor carriers ask me to revise my claim to reflect manufacturing cost and not invoice cost. They explain because I am the shipper I do not have a right for full invoice price. They imply that I would be making double profit because the product can be replaced. The products I move are chemicals and plastic resins. I have questioned the carrier's policy because it seems to contradict what I read in your book *Freight Claims in Plain English*. A carrier provided the response below when I inquired about their policy.

You've questioned the basis of our policy of compensating freight damage losses only due to the extent of the "actual cost", that is, paying only your cost of goods without paying for your profit on the goods. The basis for our policy is well-established law supported repeatedly by the U.S. Supreme Court in its application of 49 U.S.C. §14706, the "Carmack Amendment". A variety of cases involving, for example, Old Dominion, Gordon's Transport and Preston Trucking, have endorsed the idea that a trucking company is only liable for the actual cost because the claimant is only entitled to recover the cost of replacing the freight being shipped, not replacing the profit contemplated in the sale. As one court said, the only loss the claimant has suffered is the cost of manufacturing the replacement shipment. The Trucking Company is not the insurer of the goods it hauls.

Other than being limited to paying only the actual cost of damaged goods, trucking companies are further protected by the laws and tariffs which, in many instances, limit or eliminate liability for damaged freight. Hauling millions of tons of freight per year, we pride ourselves on our low ratio of damage claims. However, when damage occurs, we attempt to respond diligently to our customer, fairly pay claims for which we are responsible, but we do so respecting our own legal rights as a trucking company. Unfortunately, some claims end up in litigation, and we have prevailed many times on the basis of the laws explained in this letter.

I feel my company has a right to full invoice price for loss of material. I am very diligent in making sure all cost are mitigated and if salvage or rework of the product is possible that it is done and deducted from claim amount. I have asked the carrier above to provide specific cases in which it had vaguely referenced in the letter to support their argument. They have not yet given me anything specific to look into. I would negotiate with the carrier with the understanding that I am doing them a favor. What is the current legal authority on this situation? I appreciate any help you can provide.

Answer: The carriers are wrong.

Where goods have been sold to a customer, and are lost of destroyed in transit, the proper measure of damages is the invoice price to the customer, and not the "manufacturing cost" or "replacement cost". This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.3.

A recent case discussing the question of measure of damages is *Custom Cartage, Inc. v. Motorola, Inc.*, No. 98C5182, 1999 WL 965686 (N.D. Ill. Oct. 15, 1999), in which the Court stated:

> d. Invoice value as Measure of Damages
>
> Finally, J & P argues that the invoice value of the cellular phones is not the proper valuation of the loss, but that the production costs are the proper measure of damages. Under the Carmack Amendment, absent any limitation on liability, Defendants' Motorola and TCS may recover for "actual loss." See 49 U.S.C. §14706(a)(1). "Actual loss" is measured by the market value of the goods at destination. See, e.g., *Gordon v. United Van Lines, Inc*., 130 F.3d 282, 287-88 (7th Cir.1997); *Polaroid Corp. v. Schuster's*

Express, Inc., 484 F.2d 349 (1st Cir.1973). J & P argues that the measure of damages should be production costs, which is similar to replacements costs. Another measure of damages other than market value may be used if for special reasons market value is not exact or otherwise not applicable. See *Eastman Kodak Co. v. Westway Motor Freight, Inc.*, 949 F.2d 317, 319 (10th Cir.1991). It is incumbent on the carrier to show that the market value rule will not result in a just measure of actual damages. See id.

However, J & P has not demonstrated that the market value rule should not be applied. Courts have held that "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 had been performed." *Polaroid Corp.*, 484 F .2d at 351. J & P argues that because Motorola is not the sole producer of cellular phones and Motorola's cellular phones are not unique goods, the better measure of damages would be production or replacement costs. The Court is not convinced that the market value rule should be thrown out any time the lost shipment is a product that is not unique or produced by more than one manufacturer. The court in Polaroid, declined to measure damages by replacement costs because the lost shipment consisted of goods in great demand. See id. at 352. Here, Motorola's cellular phones can likely also be considered goods in great demand, and the market value rule could be applicable. Moreover, the invoice value could serve as the proper measure of market value.

Thus, the Court denies J & P summary judgment on its motion claiming that the invoice costs cannot be the proper measure of damages and rather that the production costs are the proper measure of damages.

The question of the proper measure of damages was also discussed in *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), in which the court stated:

Amount of Actual Damages

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.

318) FREIGHT CLAIMS – MEASURE OF DAMAGES

Question: Our shipper submitted a claim to our carrier. The carrier turned the claim over to their insurance company. After reviewing the claim the insurance company says they are only liable for the manufacturer's cost of the product since our shipper replaced the product. They say they have court cases to back up their decision. Everything that I have read says that the carrier is responsible for the full invoice price of the claim. If we accept the manufacturer's cost can we offset the profit against the freight charges we owe the carrier?

Answer: I would first note that the motor carrier's liability is independent of whatever its insurance policy or its insurer may say, and the motor carrier will be liable for the shipper's "actual loss".

Where goods have been sold to a customer, and are lost of destroyed in transit, the proper measure of damages is the invoice price to the customer, and not the "manufacturing cost" or "replacement cost". This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995)

at Section 7.2.3. 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).

As far as offsetting claims against freight charges, this is not illegal and is a fairly common practice. Beware though that the motor carrier might bring legal action to collect its charges, in which case you might have to pay its charges and file a counterclaim for the loss/damage.

319) FREIGHT CLAIMS – MEASURE OF DAMAGES

Question: On a warehouse transfer, carrier did not protect product as requested on bill of lading at 35-45 degrees and the product was refused at our main warehouse. We filed a claim for manufacturing cost only, rather than the full selling price. What is the correct measure of damages?

Answer: Your question involves the proper measure of damages for loss or damage in transit.

If goods are lost or damaged moving between two facilities of the shipper, carriers will generally argue that the "manufacturing cost" is the proper measure of damages. Actually, a more correct measure would probably be the inventory value of the goods as carried on the books of the company.

There are a number of cases involving movements from plant to warehouse in which the courts have allowed the manufacturer to recover its selling price (as opposed to its manufacturing cost). These cases turn on whether there was a reasonable certainty that the goods would in fact have been sold to customers within a reasonable time. If this can be established, the selling price (less any expenses of sale that have not actually been incurred, such as commissions) is the correct measure of damages.

This subject that is discussed in "Freight Claims in Plain English" (3rd Ed. 1995) at Section 7.0, and more specifically at section 7.2.3.

320) FREIGHT CLAIMS - MEASURE OF DAMAGES; CONSEQUENTIAL DAMAGES

Question: Our insured (motor carrier) was hauling a new boat to a new boat dealership. During transit the electronics arch of the boat impacted with an overpass and was severely damaged. The boat was delivered to the consignee and repairs were made. The total repair cost was $8,429.92 and the MSRP on the boat is about $100,000, and invoice at destination $85,000.

The repairs were covered under the warranty from the manufacturer/shipper and they filed the actual claim. The total claim is $8,429.92 for the repairs and $10,000 for "Discount off invoice to dealer".

The dealership wrote a letter to the manufacturer/shipper complaining about the amount of time and effort required to repair the boat and asserting they missed the sales window for that year. We believe this letter is the cause of the $10,000 discount on the invoice. When we asked the claims representative for the manufacturer/shipper if they had any paperwork to backup this claim we were informed that they did not.

Is this $10,000 amount an actual "loss" or a business decision made by the manufacturer/shipper?

Is the motor carrier liable if the manufacturer/shipper can prove diminished value or loss of market?

Would the discount be considered a “consequential loss”, or “direct loss”? It seems clear on what I have learned that this is an exposure owed by the carrier, if the shipper can prove their loss. But most

Cargo Legal Liability Policies exclude, “Consequential loss, loss of use or loss of market.” Many insurance claims people look at the discount as “consequential loss” rather than “direct loss”.

The cargo was moved under a Straight Bill of Lading (“B/L”). The damage is noted on the B/L. The carrier does not have a written contract with the manufacturer/shipper.

I guess our question is whether the carrier is liable for this alleged $10,000 discount the shipper gave to the consignee in order to get them to accept the boat?

Answer: Apparently you have no quarrel with the portion of the claim that deals with the repair costs.

The usual measure of damages, as discussed in many court decisions, is the “destination market value” of the goods. As to the “Discount off invoice to dealer”, I would note first that the shipper has the burden of proving its damages. However, it would seem foreseeable that a boat that had been repaired would be worth less than one that had not been repaired, and that a reasonable “discount” to the purchaser would be appropriate in order to mitigate the damages.

The question of “general” vs. “special” damages, as it is generally referred to in the decisions dealing with carrier liability, is one of those “gray areas” of the law and often turns on the specific facts of each case, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.0.

For example in *Paper Magic Group V. J. B. Hunt Transport*, 318 F.3d 458 (3rd Cir. 2003), the court was dealing with damages for a shipment of Christmas cards that was shipped on October 16, 1998, but got “lost”, and was not located until February 5, 1999, almost four months later. The court held that the shipper was entitled to “actual damages”, namely the full invoice value of the goods:

> Paper Magic is not seeking special damages. It is not seeking recovery for its loss of use, its lost future profits, or its additional labor. Instead, it is seeking actual damages: the loss in value of the shipment due to Hunt's delay. We do not think that the District Court erred in concluding that Hunt can be charged with foreseeing that a four month delay would cause harm to Paper Magic. A carrier has reason to believe that a delay of four months will substantially diminish a shipment's value, particularly when the shipper, with whom the carrier has an ongoing business relationship, is in the business of producing seasonal paper goods.

I think that the reasoning of the *Paper Magic* case would be equally applicable to the carrier’s liability in the fact pattern you have described.

Note that I do realize that you are asking a slightly different question: whether the carrier's insurer is obligated to indemnify the carrier under the terms and conditions of the carrier's Cargo Legal Liability Policy. I do not offer an opinion as to whether the result could be different from what I have stated above.

321) FREIGHT CLAIMS – MISSING SEALS ON RAILCARS

Question: I am a member of Transportation Consumer Protection Council, Inc. My employer would like your guidance on a notification that Union Pacific Railroad sent to its customers regarding their freight claim policy of missing or broken seals for railcars unloading at Union Pacific destinations.

Could you advise the position our company should pursue to protect itself against the above claims policy that Union Pacific has established.

Answer: As you must be aware, since 9/11 there has been growing concern over the “Bioterrorism threat” and the possibility that food and related products might be the target of

intentional contamination with hazardous or toxic substances. Most shippers of such products have instituted policies requiring seals on containers, trailers and railcars.

The problem arises when a seal is found to have been broken at the time of delivery. While there may be a perfectly innocent reason, and no actual contamination (or loss of product), the mere POSSIBILITY of contamination often can result in rejection of the shipment and destruction of the product.

The procedures outlined by the railroad for reporting missing or broken seals are not unreasonable, since it is important to have a prompt and thorough investigation, and to initiate corrective action if that is indicated.

Likewise, it is correct to say that "missing or broken seals alone do not constitute a claim against the carriers", and a claim in writing should always be filed if there is transit loss or damage.

The real issue is the railroad's statement: "Proof of contamination or missing product is required. The Customer must establish that product has been damaged, contaminated, or missing along with broken or missing seals for a claim to be considered." This would appear to be merely a restatement of a claimant's usual burden of proving a loss or damage on delivery.

In some situations, depending on the nature of the product, its packaging, etc. it may be possible to determine that there is virtually no possibility of contamination, and it would reasonable to accept and use some or all of the product. This is consistent with the legal principle that all parties have a duty to mitigate the loss.

On the other hand, the courts are beginning to recognize that, when dealing with products intended for human consumption, no chance should be taken if a product could be contaminated. Thus, there may well be situations where it is difficult to determine whether product might be contaminated, or what foreign substance might have been introduced. Typically, this could be a bulk shipment such as a hopper car of flour, or a tank car containing syrup, juice or other liquid ingredients. Because it may be impossible to completely test the product for all possible chemical or biological substances, the possibility of contamination alone may dictate that the product be rejected and destroyed, as required by the Food and Drug Act.

Obviously, each case must be decided on the specific facts involved.

We would advise that you make sure that both shipper and consignee are alerted to these problems. Shippers should establish and enforce adequate procedures as to applying and recording seals at origin; consignees should have procedures for reporting, investigating and documenting any seal defects at destination. If there is any question that a food shipment might possibly be contaminated, quality assurance personnel and the carrier should immediately be notified and requested to conduct a thorough investigation. [1]

322) FREIGHT CLAIMS – MITIGATION OF DAMAGES AFTER ACCIDENT

Question: A truck of ours was involved in an accident that resulted in possible cargo damage. Because of the nature and severity of the accident (fatality involved), the customer took the trailer and cargo to a secure yard to preserve the trailer as required by a court order. The trailer was an intermodal unit that did not belong to us. The customer made arrangements to have the cargo trans-loaded and returned to manufacturer for inspection. The cargo was a load of copper electrical wire in boxes and on reels. Several months later we received a claim

[1] When sensitive products are being shipped, the shipper should consider using 1/8th inch high-tensile steel cable seals to reduce the chance of break-ins. (See TransDigest # 70, November 2003, re BNSF's new tariff rule requiring the use of such seals.)

from the customer stating what was damaged and what had already been salvaged. The customer had arranged salvage on its own with the manufacturer without consulting us. When I questioned this action with the customer I was told that they felt that the price they were given for the salvage was good and they went ahead with the salvage and disposition of the damaged product. When we requested proof of the damage we were given photos of the cargo before it was removed from the original trailer that was involved in the accident. Even though the cargo had shifted due to the accident, the photos were inconclusive of damage to the product. Only a couple of the wood reels were broken and there were some scuffmarks on the coating on the wire on a few reels and the boxed wire remained intact. We were also given a breakdown of the salvage and the damage by pound not by coil or piece count, as well as a copy of the commercial invoice. I then requested a list of what exactly was salvaged and what was damaged. We were told that the information was not available because what could be salvaged was salvaged and what was damaged was destroyed. They kept no paperwork concerning these issues.

Our customer is now demanding payment of this $9,000.00 claim. The product is no longer available for us to send an inspector and we feel that we were denied our right to inspection and salvage. At this late date, how can we be sure that we are not being billed for an entire reel of wire when the customer pulled off 50 feet of damaged wire and sold the balance of the reel, or were we billed for a damaged reel and the customer re-rolled the wire on to another reel? Can we deny the claim due to being denied our right to salvage and inspection? What other recourse do we have?

Answer: The shipper probably should have allowed you to participate in the inspection of the damage, and if so, this problem might have been avoided.

The parties have a duty to mitigate damage, and usually this means that the goods should be salvaged if it is reasonable and possible to do so. Damage to electrical wire poses special problems because the integrity of the insulation is critical as a safety concern. Also, wire is often sold to customers for specified jobs requiring a particular length.

I realize that you question whether the shipper has maximized the salvage proceeds from this damaged load, but I see no evidence that they failed to take reasonable measures under the circumstances.

I would suggest that you discuss this further with the shipper and see if there is a mutually agreeable compromise. If not, you will probably have to pay the claim.

323) FREIGHT CLAIMS - MITIGATION OF DAMAGES

Question: When a shipment to a customer is damaged, I file the claim for the full invoice value of the product, and any freight charges that are pertinent to the claim. Damages were noted on the delivery receipt. An inspection was performed, and now the carrier is asking that we mitigate down to the lowest value. “We do not feel that your claim represents the true measure of damage. The amount stated in your file is the full invoice, even though this merchandise has value. It is the responsibility of the shipper and the consignee to mitigate the loss by either repairing the goods, selling the product at a reduced amount, thereby reducing the claim amount, or to return the product to the vendor.” My customer can recycle the product to be used in making new product, but that takes electric, and time. As per my customer, the product is not usable, or repairable in its present form.

My question is, can’t I get my customer the full invoice value, as the product is now useless to them? They did not lose the sale to the customer, but they lost the profit that this freight could have brought them.

Answer: Where goods have been sold to a customer, and are lost or destroyed in transit, the proper measure of damages is the invoice price to the customer, and not the “manufacturing

cost" or "replacement cost". This subject is discussed in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.2.3. 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).

As a general rule, there is a duty to "mitigate damages". This usually means that damaged items should be repaired, repackaged, etc., if it is reasonable under the circumstances to do so. You have not indicated what kind of product was involved, but if there is some reasonable and cost-effective way to salvage the material, this should be done and an allowance should be deducted from the claim.

324) FREIGHT CLAIMS - MITIGATION OF DAMAGES

Question: Is there an "Industry Standard" for freight salvage allowance?

We have a carrier who stated they are entitled to a salvage allowance for the value of a claim. The claim total is $117.00, which all is past due.

Answer: There is no "industry standard" for a freight salvage allowance. Carriers are required under federal regulations, 49 CFR Part 370, to evaluate each claim on the facts.

When a shipment is damaged, both the shipper and the carrier have a duty to mitigate the loss. What this usually means is that if goods are not so badly damaged that they are substantially worthless, reasonable efforts should be made to repair, repackage or otherwise to salvage the goods. If this cannot be done, then there is no salvage.

325) FREIGHT CLAIMS – MITIGATION OF DAMAGES

Question: Our corporate headquarters is in Connecticut and we have product stored in a public distribution center in California. My question is that when a carrier damages freight which is shipped out of our CA. warehouse what are my rights as a shipper. Our warehouse has no way of repacking this drum because the material is corrosive, and I don't want to have to pay freight back to CT. Do I have to accept the drum back from the carrier and do I have the right to ask them to ship it back to CT where I can properly recover the material.

Answer: The parties have a general duty to "mitigate damages" which means that you should attempt to salvage damaged shipments when it is reasonably possible to do so. Some carriers will return damaged shipments free of charge, but there is no legal obligation to do so. The cost of return transportation should be calculated in determining how to mitigate the loss. If the cost of shipping it to CT from CA exceeds the value of the material, it would not be in mitigation of the claim to do so. In that case, it may be more economical to have the material dumped and seek the full value from the carrier.

326) FREIGHT CLAIMS – MITIGATION OF DAMAGES

Question: Please tell me where I can find the rule/regulation that a shipper has the obligation to mitigate a claim to the lowest possible amount.

I have a roll of carpeting that was damaged by an interline carrier we hand off to (we don't deliver to this particular area). The roll was refused due to damage. We called the shipper and they refused to issue authorization to return the roll to them because it was damaged and too small to restock after cutting the damage off. We can't make them take it back. We paid the claim and transmitted the claim to the interline carrier. They declined our claim stating the

shipper is obligated to take the roll back and mitigate the claim. They still have possession of the carpet.

Please advise or let me know where this is written.

Answer: There is no "rule/regulation" per se that establishes an obligation to mitigate a claim to the lowest possible amount. The principle of mitigation of loss has evolved from court decisions over the years, see "*Freight Claims in Plain English*" (3rd Ed. 1995) at Sections 7.1.4 and 10.9.

In applying this principle, each case must be evaluated on its own facts to determine whether it is reasonable under the circumstances for the shipper to repair, salvage, repackage, etc.

As a practical matter, your shipper may or may not have any buyers for a short roll of carpet, and it may be essentially "worthless" from a commercial standpoint. If so, your connecting carrier should pay the full value of the claim. As an alternative, either your company or the connecting carrier may want to try to sell the carpet for salvage, in order to reduce the loss.

327) FREIGHT CLAIMS - MULTIPLE MISDELIVERY

Question: Our company was called to pick up 2 shipments from a shipper going to 2 different consignees. One shipment delivered clear of any notations of any overages or shortages. The other shipment delivered with damage notations and carton numbers of the damaged items. In each case, the packing slips were provided. Ten days later the consignees called to say they were putting the product away and found this was not their shipment. Each said they received the other's freight.

At least one of the shipments was inspected at time of delivery because they noted the carton damaged. I suspect the shipper mislabeled the cartons because this problem would have been noticed and corrected immediately. The shipper has since sent each the "correct freight" via another carrier. At this point, the pallets were compromised so verification of liability cannot be done, and the shipper does not want the product back so correction is no longer an option. The Shipper intends to file a claim on each.

The industry standard to report concealed loss is 24 hours. This is because time is of the essence to correct problems - whether it was caused by the shipper or carrier. Carriers are expected to correct any problems within a reasonable time frame (usually 48 hours). Carriers at that time do their due diligence to find out how it was caused. I understand the Carmack Amendment's 15 day rule. However, in this case it does not apply because it is not damage or even loss, it is misdelivery.

My question is twofold:

What is the Consignee's responsibility in this instance?

Are there any legal defenses to decline these claims?

Answer: Whether or not the shipments were delivered to the wrong consignee, it appears from your statement of the facts that one of the shipments was "delivered with damage notations and carton numbers of damage items". I assume that this damage was observed and noted at the time of delivery. If so, then the claim does not involve "concealed damage".

While it is always a good practice for a consignee to notify the carrier promptly upon discovery of damage, and to request a joint inspection, there is no law or regulation that provides a defense to the carrier if the consignee fails to do this.

The claimant has the burden of proving good condition at origin and damaged condition at destination, and its measure of damages (normally the invoice price of the goods). If this has been done, then the claimant has established its "prima facie case" and the carrier will be liable for the loss or damage unless the cause of the loss is one of the excepted causes in the bill of lading (act of God, act or default of the shipper, etc.) and the carrier is free from any negligence.

328) FREIGHT CLAIMS - NECESSARY DOCUMENTATION

Question: We have a carrier that is insisting we supply them with all invoices pertaining to a particular shipment. This is virtually impossible for our client to produce. I supplied them with the original invoices for the damaged items and they are insisting that we supply a copy of the "entire invoice for the entire shipment." They specified if they did not receive this invoice within 15 days the claim would be considered declined due to lack of complete information. I have let them know that we are unable to get this information and as far as I can tell do not have to provide this information. They have declined our claim due to lack of complete information and will not reopen. Any help in this situation would be appreciated.

Answer: It would seem that the carrier is being unreasonable.

There are federal regulations of the Federal Motor Carrier Safety Administration (formerly the Interstate Commerce Commission) that govern the filing and processing of claims for loss and damage that are found at 49 CFR Part 370. These regulations are available online at http://www.access.gpo.gov/nara/cfr/waisidx_02/49cfr370_02.html. I would suggest that you refer the carrier to these regulations and ask them to reconsider their declination.

If all else fails, your only remedy (unfortunately) may be to take legal action.

329) FREIGHT CLAIMS – NOTATION OF SEAL ON BILL OF LADING

Question: Our Company shipped out freight and on the Bill of Lading ("B/L") a trailer number and a seal number were noted by the driver.

When our Customer received the shipment, they made notation on the delivery receipt that there was a shortage of 2 pallets. I should mention the fact that the delivery receipt provided is actually the B/L copy with a stamp at the bottom from the receiver, that has a place for the receiver's signature and a space for the pieces that were received to be notated. Below the stamp was where the notation of 2 pallets short was written. The carrier is declining payment on this claim because the receiver did not document any seal on the B/L, that carrier negligence has not been established. The B/L has the seal number on it already so why would the receiver reference that seal number again?

If carrier is not responsible, then would the receiver be responsible because they did not reference the seal number as the carrier declined based on that issue?

Answer: You have to go back to the claimant's 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.

This is not affected by the existence or non-existence of a seal, except that if the shipper's seal is intact at the time of delivery, it would normally establish a rebuttable presumption that a shortage did not occur in transit (unless there is some evidence of tampering with locks, hinges, doors, etc.)

Either there was or was not a shortage at the time of delivery -- it is a simple question of fact. If the carrier disputes the quantity that was delivered, I would suggest that you get a written statement from the consignee detailing the facts of the shortage, how and when it was discovered, whether the driver was present, etc. and submit it to the carrier.

330) FREIGHT CLAIMS – NOTATIONS OF SHORTAGE

Question: I have a customer that shipped 400 cartons of stuffed animals from a customs warehouse in Southern California to a warehouse in Orlando, Florida.

The driver hand stacked the shipment in his trailer and signed for 400 cartons, upon his arrival in Orlando he was assigned a dock and told to wait in his truck while the warehouse personnel unloaded the shipment, then brought the signed paper work out to the driver and handed it over and said " Have a nice day", that was January 6, 2003. On January 23 an official from Sea World sent an email to my customer stating there was a 40 carton shortage.

I requested delivery receipts from both the consignee and the carrier.

What I found was that the consignee signed his name on the signature line and beside it in small print was 360 with a circle around it. No other mention of a shortage.

My questions are:

1. Is there any legal precedent that requires a carrier to acknowledge a shortage if the consignee is aware of the shortage at the time the shipment is signed for; such as the driver signing the bill and noting the shortage?

2. Is there a standard for reporting a shortage to the carrier prior to the carrier leaving the facility?

3. Is the consignee required to address a shortage or fill out the delivery receipt in any particular manner so as to be clear and concise about the condition of the freight or the accuracy of the piece count?

Answer: Clearly it is always a "best practice" for the consignee and the driver to inspect and count the freight as it is unloaded. The consignee should make a notation of any over, short or damage on the delivery receipt at that time.

If this is not done, any shortage or damage discovered later will probably be considered "concealed" shortage or damage, and there will be a dispute as to the count or condition of the goods at the time of delivery by the carrier.

This is not something that is found in a federal law or regulation; it is just common sense and good business practice.

331) FREIGHT CLAIMS – NOTATIONS ON DELIVERY RECEIPT

Question: We allow our carriers to drop their inbound loads and then later we unload them into our distribution center. Is there a need to put any notation on the delivery receipt that the load is subject to count and inspection? We had a shipment this week where we unloaded it and found that the trailer had a leak and we have water damage on a few cases. We are going to file a freight claim with the carrier but wanted to know if the fact that we signed a "clear" delivery receipt will give them a basis to deny the claim.

Answer: Notations such as "subject to count" or "subject to inspection" really have no legal significance. If the consignee signs a delivery receipt without any exceptions, the carrier is entitled to a rebuttable presumption that the shipment was delivered in good order and condition.

What this means is that there is an additional burden on the consignee/claimant to establish through appropriate evidence or testimony that the shortage or damage existed at the time of delivery and not at some subsequent time.

These subjects are covered in *Freight Claims in Plain English* (3rd Ed. 1995), which is available from the Transportation & Logistics Council, Inc.

332) FREIGHT CLAIMS – OBLIGATION TO PAY FREIGHT CHARGES

Question: We have a carrier that is refusing to pay our freight claim. They are citing a law that I cannot find evidence of. I have asked them for proof but they keep forgetting to fax the info to me. Here is my situation:

There are four parties involved here as follows: John Smith Trucking ordered several new trucks, which were initially delivered to Truck Body Installation Company (TBIC). Once the truck boxes were manufactured and installed, TBIC hired Truck Delivery Company (TDC) to deliver the trucks to my company, for final prep & delivery to John Smith Trucking. We discovered in-transit damage. We contacted TDC, documented the damage per their specific requirements, and made repairs with their full knowledge. We even have claim numbers that TDC assigned to our claims, faxed to us.

We were never paid for our repairs, which we made in 2/02. TDC claims that TBIC has never paid the shipping charges, and because of this, they are under no obligation to pay us for the repairs we made. TDC claims that there is a law supporting them on this.

I have asked repeatedly for a copy of this "law", but they have provided nothing as of yet.

Is there such a law? How do I proceed, to make TDC pay us?

Answer: There is no "law" that says that freight charges must be paid as a condition precedent for filing or paying a claim for loss or damage in transit.

In your situation, it appears that the carrier has a claim against the shipper for its freight charges, and you, the consignee, have a claim against the carrier for the loss/damage. The best way to resolve the impasse would be for you to get the shipper to pay the carrier.

If that fails, you may have to bring a lawsuit or, if the parties agree, submit the claim to arbitration. Be aware, however, that the carrier will probably interpose a counterclaim for its freight charges.

333) FREIGHT CLAIMS – OF SEALS AND COUNTS

Question: I have a customer that places a seal on the trailer once it is loaded. It used to be in the past as long as the seal was shown intact on the proof of delivery we were able to deny this claim. Recently there has been a change to this department and the new manager stated that these are not shipper load and count, that if the driver chooses not to get out and count every piece, then, when he is short they will file a claim and expect it to be paid.

Also of note this customer also stated that whether the product was left behind or not would not matter as our driver signed for the full load. I requested a copy of their inventory the day before, on and after the shortage, which he refused to provide. He stated that our drivers could take the shrink wrap off and break down the pallets to count this product instead of sleeping in their trucks, which I can not be sure if the driver was or was not sleeping.

Because it is not a shipper load & count load, is the shipper correct in stating the claim needs to be paid regardless of where the product is?

Answer: This subject has come up a number of times on our "Q&A" forum and I am repeating an answer that I think addresses your question:

> Unfortunately, this is becoming a very common problem. When cartons have been counted and loaded by the shipper on a pallet, and then shrink-wrapped, it is often impossible for the driver to verify the count. Carriers understandably do not want to take responsibility for a specified number of cartons unless the driver has had an opportunity to count what is on the pallet. Many carriers now direct their drivers to sign only for a pallet count when goods are tendered on shrink-wrapped pallets.
>
> The uniform straight bill of lading contains the language: "Received... the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown)...."
>
> I am not aware of any court decisions which expressly deal with the carton vs. pallet issue but basically, the issue comes down to your burden of proof. In a shortage situation, the claimant has the burden of proving what was actually

tendered (number of pieces) to the carrier at origin, and what was actually delivered. Obviously you have a factual question as to what the carrier received and what it delivered, and further investigation is required.

You should start with the supplier and get verification as to how the product was counted and palletized, whether it was shrink-wrapped or banded, whether the driver was present during the loading and had opportunity to count the packages and/or pallets, whether the trailer was sealed, etc.

You should then ask similar questions of the consignee. Since the consignee signed for pallets, you should find out whether there was evidence that any pallets had been broken down or re-wrapped, and where the shortages were located.

Now, you have also asked about sealed trailers.

If the trailer was sealed at origin, and is delivered with the origin seal intact, there is a strong presumption that the loss did not occur in transit (unless there is evidence of tampering with the seal, door locks, hinges, etc.)

The thing to remember is the claimant's basic burden of proof. The claimant must prove with competent evidence (statement or affidavit from an employee having actual knowledge, shipping documents, loading tallies, etc.) what was actually loaded into the trailer at origin. Likewise, there must be competent proof that there was in fact a shortage at the time the trailer was delivered (and that it did not occur after delivery).

334) FREIGHT CLAIMS - OFFSETS AND TIME LIMITS

Question: For motor carrier - If a claim has reached the two-year and a day from disallowance limit for suits, can a shipper still do an offset on these claims?

Answer: I am assuming that the bill of lading or tariff properly incorporated the two-year and a day contractual time limit for commencing suit on a loss or damage claim. If so, this would be a valid defense if the shipper were to bring a lawsuit. However, this time limit would have no application to an offset by the shipper against unpaid freight charges. It would not be "illegal" per se for the shipper to do this.

This does not completely answer the question.

If the carrier brings a suit to collect its freight charges within the 18-month statute of limitations applicable to the collection of freight charges, the shipper would probably try to file a counterclaim for its unpaid loss/damage claims. Most likely, the court would grant judgment to the carrier on its freight charges, but the shipper would not be able to collect on its time-barred loss/damage claims (note that there may be some exceptions in the court decisions depending on the facts).

335) FREIGHT CLAIMS - OFFSETTING

Question: We received a claim from the origin carrier on a shipment for 5 cartons missing on a shipment turned over to us for delivery to the consignee. We signed for 1 shrink-wrapped pallet from the origin carrier and the consignee signed for 1 pallet on a clear delivery receipt. Additionally, the origin carrier signed for 1 pallet from the shipper with no piece count verified.

We declined the claim due to a clear delivery receipt and noted that we deliver off of the bill of lading and not the packing slip.

Today, the origin carrier reduced a payment check to us by the amount of the claim.

Is this legal?

Answer: I assume that the interline carrier did in fact pay the shipper's claim for the alleged shortage. Obviously, you do not think your company was responsible for the alleged shortage, and you may want to explain the facts and discuss this further with the interline carrier.

However, unless you have a contractual agreement that would prohibit offsetting claims against freight charges, it is not "illegal" to offset mutual accounts or debts, and it is a common commercial practice.

336) FREIGHT CLAIMS - OFF-SETTING FOR CONCEALED DAMAGES

Question: A carrier delivered two shipments to us. The freight was sent collect, and we have an account with the carrier. This freight moved from Louisiana to Ohio. The product was signed for as "received in good condition" (standard customer signature). Within 15 minutes of delivery, immediately upon inspection while opening the product we noticed that the product had been damaged. We immediately contacted the carrier and spent over 18 minutes with the carrier explaining the situation. We asked that the driver return to reflect the damage upon the freight delivery ticket. We have telephone records to document this.

The carrier dispatched MTI Inspection Services within 24 hours and the inspection report reflects the appropriate damages. We then asked that the sales person help prepare the claim paperwork and submit the claim. She did and the first claim was denied as each individual bill must reflect an independent claim. The claim was resubmitted and then again denied as the goods were signed "received in good condition".

About four months after the loss, and numerous letters back and forth, we suspended payments against our current invoices and submitted a letter and "payment in full" check less ½ of the damages. The carrier acknowledges receipt of the letter and cashed the check. Now the carrier has recently withdrawn our discount, restated our invoices without our discount and sued us for 3 times the monies in question.

We had an independent testing lab evaluate the goods and the documented report stated that a hydraulic oil covered and soiled our product (which is a food product).

How is this carrier not responsible for the concealed damages? What is the rules regarding claims of such? What course of action should be taken?

Answer: You are "mixing apples and oranges". The carrier's liability for loss or damage to goods is independent of your liability to pay freight charges.

As to the latter, it sounds as though the carrier may have some tariff provision that provides for a loss of discount or some other kind of late payment penalty. These provisions can be enforceable, but only IF the carrier complies with the federal statutes governing billing disputes and the regulations governing the extension of credit. In this regard, you may have a defense if the carrier has sued to collect its charges. I would also point out that, if the carrier has brought suit, you have the right to interpose a counterclaim for your loss or damage claims.

337) FREIGHT CLAIMS – OFFSETTING FOR DELAY

Question: We arranged for a carrier to pick up a load on Friday that was to be delivered on Monday. On Monday the load was not delivered and we could not even locate the driver. The load was finally delivered on Thursday. The plant had downtime and is now charging us for the downtime. Can we legally deduct this amount from the carrier's pay? Our rate agreement has stated if the services are not fulfilled the rates are negotiable and our broker carrier contract states the same. We have both signed copies of the rate agreement and the broker carrier contract.

Answer: I assume you are a broker and that you brokered the subject shipment to the carrier that failed to deliver with reasonable dispatch.

The first question is whether the shipper can legitimately claim for the "downtime" since this would ordinarily be considered "special damages".

The second question is whether you, as a broker, should have any liability to the shipper for the delay. Ordinarily, a broker is not liable for loss, damage or delay, and claims should be submitted directly by the shipper to the carrier.

As to whether you, as the broker, can offset the amount of the shipper's claim, there is no legal prohibition against offsetting claims against freight charges. However, it is suggested that you check the carrier's tariff first, as it may have a "loss-of-discount" rule for late payment. Also be aware that the carrier could bring legal action to collect its freight charges, and you (or the shipper) might not be able to prevail on a counterclaim for the delay.

338) FREIGHT CLAIMS - OLD CLAIM WITH DOUBTS ABOUT DELIVERY

Question: I want to file a claim against a carrier. My customer never received the goods. The original straight bill of lading was prepaid, FOB shipper. The carrier assigned the goods to another carrier in the local delivery area. The delivery was to be made at a mall but there is no log entry made by security for the carrier ever being there. There is a proof of delivery ("POD") with an illegible signature. I checked with my customer, security and the mall leasing office, no one has ever heard of the person who signed the POD and I think it must be fake.

The delivery goes back to July, 2003. Is it too late to file a claim (greater than 9 months)?

Would the local carrier have any liability?

Is the POD binding since no-one knows who this person is?

Answer: 1. The claim may be time-barred, but you must first look at the actual bill of lading that was used. The 9-month time contractual time limit for filing a claim is usually found in the terms and conditions on the reverse side of the "long-form" version of the Uniform Straight Bill of Lading. It can also be incorporated by reference on the "short-form" version of the bill of lading by referring to the USBOL or the National Motor Freight Classification. Unless the time limit is properly set forth in the bill of lading or incorporated by reference it would be unenforceable.

2. Under the "Carmack Amendment" (49 USC 14706), both the receiving and the delivering carrier are jointly and severally liable. You can file a claim with either one.

3. Whether the proof of delivery is legitimate or false is a question of fact. The carrier will probably argue that the goods were delivered, so you will need a written statement from the consignee that it did not sign the delivery receipt or receive the goods.

339) FREIGHT CLAIMS – OVER TWO YEARS TO NOTICE MIS-DELIVERY

Question: On July 30, 2004 we brokered a load to a carrier consisting of two machines (similar in function but different in price) from a manufacturer in Indiana to two separate consignees in California. The bills of lading were signed, "clean" upon delivery. I received a letter over two years later (Dec 19, 2006) from the manufacturer stating that the machines were mis-delivered to the respective consignees.

I have no doubt from their documents that they were but is there not a statute of limitations on this? Both consignees have been using the machines for over two years and now the one consignee wants a brand new machine. Our customer, the manufacturer, wants us to participate in their losses financially.

The carrier is denying any responsibility stating that too long has passed and there is no longer a valid claim. It would seem to me that although the driver had responsibility initially that

the consignees had 15 days to notice they had the wrong machines and at most 9 months to file a claim. The machines could have easily and inexpensively been transferred if we had been notified in a timely fashion, as they are but 140 miles apart. Do they have a legal case against us as the broker for damages? Do they have a case against the delivering carrier? Or is the statute of limitations up after these 2 years and 4 months? Your reply is most appreciated.

Answer: There are a number of issues involved here.

1. As a broker, you should not have any liability for the mis-delivery unless it was actually caused by something that you did - i.e., your negligence. The fact that a broker is not usually liable for loss or damage is a result of court decisions dealing with the legal relationship of the parties -- issues such as independent contractor status, agency and contract law. There is no federal regulation that would prohibit a broker from paying a claim.

2. The motor carrier would have liability for the mis-delivery, but could have defenses if sued, such as the failure of the shipper and/or consignees to mitigate the loss. In addition, if the shipment moved under a Uniform Straight Bill of Lading, there would be a contractual defense -- the 9-month time limit for filing a claim in writing with the carrier. The 9-month time limit for filing a claim is a contractual requirement found in the terms and conditions on the reverse side of the Uniform Straight Bill of Lading, not a “statute of limitations”. (Note that depending on what kind of bill of lading was issued, the shipper may still be able to file a claim with the carrier. If there was no time limit in the carrier’s bill of lading and/or tariff, a claim could still be filed, and its validity would be governed by a reasonableness standard.)

3. The statute of limitations for an action by a shipper against a broker is governed by state law and would depend on whether the complaint states a claim for negligence, breach of contract, etc.

4. This is not really a “concealed damage” situation, although your observation that the bills of lading were signed “clean” is a good point. The regulations covering loss and damage claims are at 49 C.F.R. Part 370.

5. I find it difficult to believe that the two consignees did not know they had received the wrong shipments. Perhaps the manufacturer is focusing on the wrong villain.

340) FREIGHT CLAIMS – PACKAGING WEIGHT

Question: When a carrier is paying a claim based in their limited liability i.e. $25.00/lb are they liable for including the carton weight or just the product weight?

Answer: I assume the carrier has an enforceable liability limitation in its tariff that is incorporated by reference by the bill of lading, and that the limitation is stated as "$ x per pound, per article lost of damage" or similar language.

If so, since the carrier is billing you for the weight of the product including the packaging, the carton weight should be included in the calculation.

341) FREIGHT CLAIMS – PARCEL CARRIER LIMITATIONS

Question: The University recently entered into an agreement with Airborne Express through an educational buying consortium to which it belongs. An incident recently took place relative to a shipment being damaged in transit. The item being shipped was a tape recorder valued at $2,000.00 that was being returned to a vendor for repair costing $150.00. Due to damage in transit, the cost to repair that item is now $556.00. The shipper purchased $2000.00 in insurance from Airborne at a cost of $12.00. Airborne refuses to accept any responsibility financially for damages that occurred.

According to Airborne, a standard term or condition in the agreement states that they will only accept responsibility for the first $100.00 in damages for an item specifically being returned for repair. We were also told by them that their competitors, namely FedEx and UPS, had the same policy. Furthermore, Airborne, in this particular case, is refusing to even pay the $100.00 or refund the $12.00 paid for insurance. In your opinion, do you feel that Airborne has the legal right to refuse to cover the claim for this damaged equipment? At the time of shipment, Airborne was not aware that this item was being returned for repair. Airborne states in their service guide that, among other conditions, an unacceptable shipment includes any item being shipped to be repaired when the declared value or asset protection value exceed $100 per package. Does Airborne have a viable legal right to refuse to honor this claim?

Answer: Parcel and express carriers such as Airborne have traditionally had very low liability limitations such as $100 per package, with the provision that the shipper can declare a value and pay an extra valuation charge. These limitations are generally upheld by the courts so long as there is adequate notice provided in the bill of lading or receipt. See Section 8.2.7 of *Freight Claims in Plain English* (3rd ed. 1995).

In your case, the shipper apparently did declare a value and paid an extra charge. However, the problem is that the bill of lading or receipt most likely has language incorporating the terms and conditions of the Service Guide, i.e., the Service Guide becomes part of the "contract of carriage" and thus binding on the shipper.

The fact that an item being returned for repair may be “unacceptable” does not, however, relieve the carrier from responsibility for its loss or damage. At the very least, the carrier must still pay the amount of the loss up to the limitation of liability ($100) and, in this case, it must also refund the valuation charge ($12).

If you wanted to take this to court, you might take the position that, by accepting the extra valuation charge, the carrier should be estopped from asserting its liability limitation and should pay the full cost of the repair ($556). Whether you would prevail (or whether it would be economically worthwhile) is questionable. You might want to file a claim in your local Small Claims Court.

342) FREIGHT CLAIMS - PARTIAL LOSS

Question: We are reviewing a freight claim in which the load only made it approximately 10% of the way to destination, but the shipper already paid the freight bill prior to the shipment. They reworked the damaged load, and saved 80% of the cargo. They made claim for the following:

1. 20% of the lost cargo
2. Expense to re-work the load.
3. The full freight bill.

Question: Are they entitled to make claim for the lost freight? Or simply a pro-rata share of it?

Answer: As a general rule, if a shipment is actually delivered to the consignee, and there is loss or damage to a portion of the shipment, the shipper may recover a pro-rata portion of the freight charges that have been paid.

However, if the shipment is not delivered at all, the carrier has not performed the services required by the contract of carriage, and is not entitled to retain its freight charges. See, e.g. *Beta Spawn v. FFE Transportation Services*, 250 F.3d 218 (3rd Cir. 2001).

I would note that if the claim is for the delivered price of the goods (which would of course include the freight charges to deliver the goods), the shipper cannot collect twice for the same freight charges.

343) FREIGHT CLAIMS – PAYMENT BY 3PL

Question: We are a third party logistics provider. We received a claim from our customer without proof of delivery and we went ahead and filed that claim against the carrier anyway (we're also unable to get a copy of proof of delivery from the carrier). My boss told me that we couldn't deny a customer claim since a claim was filed with carrier. Is that correct?

Answer: I would suggest that before you pay your customer's claim, you thoroughly investigate the facts and attempt to get all of the relevant documents (bill of lading, delivery receipt, over, short & damage report, invoices, etc.)

However, if your company has contractually assumed liability for its customers' loss and damage claims, you may be obligated to pay the customer, even if you can't collect from the responsible carrier.

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However, if your company has contractually assumed liability for its customers' loss and damage claims, you may be obligated to pay the customer, even if you can't collect from the responsible carrier.

345) FREIGHT CLAIMS – PAYMENT OF FREIGHT CHARGES

Question: I am looking for the law, which states the freight bill must be paid regardless of claim.

Answer: There is no such law. Shippers often will offset an unpaid loss & damage claim against freight charges, and it is not illegal to do so.

The obligation to pay a valid claim is independent of whether the freight charges have been paid (unless there is a specific, applicable tariff provision that requires the freight charges to be paid before a claim will be paid). Likewise, the obligation to pay freight charges is independent of whether there may be a claim for loss or damage.

346) FREIGHT CLAIMS – PAYMENT OF FREIGHT CHARGES

Question: We do repairs on heavy-duty trucks. A truck-body manufacturer recently installed new truck bodies on several chassis, and shipped the chassis to us for final prep and delivery to the end-user. We noted damages that occurred in transit. We contacted the carrier, documented the damages at the time we received the trucks from the drivers, received faxed confirmation from the shipper of our claims, and claim numbers. This was in February 2002.

Apparently, the body company, who was responsible for the shipping charges, has some type of dispute with the carrier, and has not paid the freight charges. My company has gone unpaid for our damage claims. When I contacted the carrier, they say that they are not obligated to pay our claim until the freight charges are paid by the shipper, the body manufacturer.

Is this true? Do I have any recourse, to receive payment for my repairs?

Answer: I believe the answer to your question lies in the FMCSA (formerly ICC) regulations at 49 C.F.R. PART 370, PRINCIPLES AND PRACTICES FOR THE INVESTIGATION AND VOLUNTARY DISPOSITION OF LOSS AND DAMAGE CLAIMS AND PROCESSING SALVAGE. The relevant provision states:

> 370.9 Disposition of claims.
>
> (a) Each carrier subject to 49 U.S.C. subtitle IV, part B which receives a written or electronically transmitted claim for loss or damage to baggage or for loss, damage, injury, or delay to property transported shall pay, decline, or make a firm compromise settlement offer in writing or electronically to the claimant within 120 days after receipt of the claim by the carrier...

It would appear that, if you have a valid cargo claim, the carrier would have to pay the claim. There is nothing in the regulations that requires the freight charges to be paid as a condition of paying a cargo claim.

I would note that, if you should commence a lawsuit against the carrier to collect your cargo claim, the carrier may counterclaim for its unpaid freight charges, if any, that are due on the particular shipment. You would then have to sort this out with the shipper.

347) FREIGHT CLAIMS – PAYMENT OF FREIGHT CHARGES

Question: First of all I would like to say that transportlaw.com is a fantastic website full of valuable information. Thank you!

I filed a claim with a carrier that was in turn declined due to "freight charges are unpaid" the shipment moved as prepaid FOB Origin. I am the consignee so a claim was filed for the invoice cost of the merchandise only, no freight charges were included on the claim.

Is it acceptable for carriers to decline a claim based on the status of the freight invoice? Do they not have an obligation to investigate the claim?

To decline a claim based on freight payment status seems unreasonable in situations were the risk of loss is on the consignee but the freight is paid by the shipper.

Answer: There is no legal requirement that freight charges be paid as a condition of filing a loss & damage claim, and it is not a proper basis for declining a claim.

The carrier does have a duty to respond and to investigate all claims as required by federal regulations, see 49 CFR Part 370.

Under the facts as described, you had risk of loss in transit (FOB origin) and therefore were legally obligated to pay the seller for the invoice price of the goods (even though damaged in transit). That is your proper measure of damages.

On the other hand, if the shipper did not pay the carrier for its freight charges, and the shipment was actually delivered, the carrier can argue that it has earned at least that portion of its freight charges attributable to the portion of the shipment that was delivered in good order and condition (if any). This would be a proper offset against the claim.

348) FREIGHT CLAIMS – PRECEDENCE OF DOCUMENTS

Question: Can you please answer a question that I have not been able to find an answer to? We received an order from one of our customers sent to us via Electronic Data Interchange ("EDI"). Our customer sent the shipment request as "Cooler" but when the order was entered and tender was sent to the carrier the load tender was sent as "Frozen". The carrier picked up the load with their trailer set for a frozen load at zero degrees. The shipper loaded the cooler freight onto this trailer and issued a bill of lading ("B/L") that had the temperature requirement of

34 degrees clearly listed. The driver signed the B/L and left with his reefer set at zero. Of course, when he arrived, the product was frozen. The carrier has declined the freight claim based on the load tender. Which document supersedes the other?

Answer: The answer to your question is not quite as simple as it might appear.

Some court decisions say that "the bill of lading constitutes the contract of carriage", see *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 29 F.3d 727 (1st Cir. 1994), but this is not entirely correct.

A B/L can act as a receipt, or as a contract of carriage, and if negotiable, as a document of title.

If there is some other contract between the parties, there are cases holding that the contract governs in the case of a conflict between the contract and the B/L. See, e.g., *St. Johns Corp. v. Companhia Geral, Etc*., 263 U.S. 119 (1923), in which the court stated: "The bill of lading on which libellant relies functioned primarily as a commercial shipping receipt and secondarily as a contract of carriage to the extent that its provisions supplemented the original agreement. There is no sound reason for ignoring the original contract, which permitted stowage on deck." See also, *Hellenic Lines, Ltd. v. United States*, 512 F.2d 1196 (2nd Cir. 1975), in which the court held that that the bills of lading did not supersede the "booking notes" as to delivery requirements.

Most cases take the view that the bill of lading supersedes prior discussions and agreements between the parties, see e.g., *Beta Spawn, Inc. V. FFE Transportation Serv.*, 250 F.3d 218 (3rd Cir. 2001) in which the court said:

> Under Pennsylvania law, "[w]here the contract or agreement is unambiguous, parole evidence of prior inconsistent terms or negotiations is inadmissible to demonstrate intent of the parties." . . . . Likewise, in its role as contract of carriage, the terms and provisions of a bill of lading cannot be varied by extrinsic evidence, and all negotiations leading up to the written agreement are presumed to be merged therein. (citations omitted).

Thus, the question is whether the document referred to as a "load tender' constituted a contract between the parties that the shipment was to be treated as "Frozen" instead of "Cooler", or whether the temperature instructions on the B/L superseded the prior information.

Without examining the actual documents, it would be my opinion that the B/L, with its express instructions as to the temperature requirements, would place the carrier's driver on notice and that the bill of lading would govern.

349) FREIGHT CLAIMS - PROOF OF DELIVERY

Question: We have both truckload ("TL") and less-than-truckload ("LTL") carriers that drop trailers at a consignee location (our customer's location). The consignee supposedly has agreements with these carriers to drop the trailers for unloading convenience and that they must respond to any damages/shortages within 24-48 hours. Failure to do so on behalf of the consignee will waive their right to file a claim for loss or damage.

Do we as a shipper have any recourse on such an agreement? The consignee debits for the shortages regardless of whether or not they properly annotated the discrepancy within 24-48 hours.

In the case where a TL or LTL carrier drops a trailer for convenience at a consignee's facility, is the carrier still liable to produce a Proof of Delivery ("POD")? We have instances where the carrier can not produce a document signed by or stamped by the consignee showing proof that carrier even delivered the trailer. The consignee is debiting us for these shortages and we are trying to determine if we should file claims based on the fact that there is no POD.

Answer: This is an all-too-common problem with dropped trailers, particularly where the trailer has been sealed by the shipper and the seal is intact at the time of delivery. Even when the carrier is able to provide a Proof of Delivery, it will probably only show that the trailer was delivered, and possibly that the shipper's seal was present and intact.

Since the trailer is not opened and the lading inspected and counted while the driver is present, there is no notation of shortage or damage on the bill of lading or delivery receipt at the actual time of delivery. Only later is the shortage or damage "discovered" and entered into the consignee's reporting system. Often consignees do not prepare accurate OS&D reports, or document how and when shortage or damage is discovered, and many large retailers merely deduct from invoices and refuse to provide such documentation to the vendor.

Assuming that you, the shipper, have risk of loss in transit ("FOB Destination"), you can still file a claim against the carrier. If possible, obtain copies of the consignee's OS&D or receiving reports, and a detailed written statement describing the shortage or damage, and submit them with your claim. Unfortunately, if you are unable to obtain adequate documentation as to the count and condition at destination, you will have difficulty in meeting your burden of proof that the loss or damage occurred in transit, and not after the trailer was delivered.

I would note that if you are experiencing recurring shortages with certain carriers or customers, you may wish to involve security or law enforcement agencies.

350) FREIGHT CLAIMS – PROOF OF OWNERSHIP

Question: My company deducts claims from certain carriers as part of the agreement we have with them.

We deducted for 1 case that was damaged - as per the proof of delivery supplied to us by the carrier. We supplied the invoice to our customer as proof of the price that they were being deducted for along with the claim form.

The carrier would like me to supply proof that we paid for the case in the first place.

I never heard of having to supply a carrier that I owned the product that I was hiring them to pick up and deliver.

Answer: I have never heard of this either. Try sending them a letter stating that you owned the product and had sold it to your customer; that if it had been delivered as per the contract of carriage the customer would have paid your invoice price of $XX.

351) FREIGHT CLAIMS – PROOF THAT FREIGHT CHARGES WERE PAID

Question: We are a 3PL. Our customer is the shipper. Freight charges on claims we file are prepaid. Pre-arranged credit terms have been established with the carrier for freight payment on all moves. Can the carrier require that we provide proof of payment of freight charges prior to processing the claim? I am not aware of any credit issues, nor does the carrier stipulate that. We provide the carrier with the pro number attached to the claim so it would be very easy for them to look up the payment history. We do not have access to the freight payment invoices.

Answer: There is no law or regulation that requires freight charges to be paid before a claim for loss or damage to goods is filed, although it is possible that some carriers may have a rule in their tariffs to this effect.

Obviously, if you are including freight charges as part of your loss and damage claim, the freight charges would have to be paid in order to get reimbursement.

352) FREIGHT CLAIMS – PROPER BLOCKING AND BRACING

Question: When filing freight claims, many times the claims are denied by the carrier for not being properly blocked and braced. This has occurred where our normal procedure has been in place for many years and no other occurrences of damage. What is the "proper" blocking and bracing procedure? How can we confirm that our blocking and backing is good so we don't find out after the fact that carrier would not honor claim?

Answer: When you refer to "blocking & bracing", I assume that you are talking about full truckload or full container shipments that are loaded, blocked and braced by the shipper.

The standards for proper blocking and bracing depend on whether the trailer/container moves over the road or partly by rail (TOFC/COFC). The rail environment typically involves greater shock, vibration, impact, etc.

If these shipments are moving TOFC/COFC, I would suggest that you purchase a copy of the "Intermodal Loading Guide" published by:

Railinc
7001 Weston Parkway, Suite 200
Cary NC 27513
1-800-544-7245

You can also order through their website: http://www.railinc.com/

This guide is widely used and many railroads incorporate it into their exempt circulars. Railinc also has many other publications dealing with rail transportation of specific commodities.

Note: Railinc was formerly a subsidiary of the Association of American Railroads and was spun off by the AAR in 1999.

You can also ask your carriers to send a damage prevention expert to your facility to advise you as to proper loading procedures. (If you follow their advice, it makes it more difficult for them to decline your claims!)

353) FREIGHT CLAIMS – PROPER NOTIFICATION

Question: What is considered reasonable notification of a loss? We shipped material to a customer in March of 2003 and have now (November 2003) been informed that the shipment was short. The delivery receipt was signed clear.

Answer: It is always a good practice for a shipper or consignee to notify the carrier promptly in the event of loss or damage, so that the carrier may investigate the claim and the cause of the loss.

From a legal standpoint, on domestic motor carrier shipments the shipper can always file a claim at any time within 9 months of the delivery. (This is governed by federal law - the "Carmack Amendment", 49 USC §14706).

I would note that in view of the clear delivery receipt, and the time that has elapsed, the claimant will have an additional burden of proving that the shortage actually existed at the time of delivery, and did not occur some time afterwards.

354) FREIGHT CLAIMS – PRO-RATING FOR PARTIAL LOSS

Question: We have carriers whose limit of liability is $.50 per lb. They are pro-rating the pounds by shipment instead of the actual weight of the damaged product. This of course is a lower dollar amount than based on the actual weight of the product. Is this an acceptable calculating procedure?

Example:

1733 pounds (Total weight of shipment) / 19 pieces (Total number of pieces shipped) = 91.21 pounds (Average weight per piece) x 2 pieces (Number of pieces claimed) = 182.42 pounds (Pro-rated weight applicable to claimed items) x $.50 (Release rate per pound) = $91.21 (Settlement amount).

Answer: First, I would check the carrier's tariff item and see what it actually says. Usually the liability limitation is stated as "____ per pound per article" and some tariffs have language that specifically states that the liability "will be determined separately for each individual distribution package lost or damaged."

Unless there is some tariff language to the contrary, I would think that a reasonable construction is that the liability limitation should always be applied to the weight of the item that is actually lost or damaged, not to some average calculated weight. (Of course, this pre-supposes that the actual weight of the lost of damaged item is known or can be established.)

355) FREIGHT CLAIMS – PROTECTIVE SERVICE REQUIREMENT

Question: Recently we had several loads come in out of temperature. The carrier claimed the reason for the loads showing up out of temperature was that there was no information on the printed bill of lading from the vendor instructing the driver what temperature the product should be maintained at. We contacted the vendor and they said that it was our responsibility to inform the carrier on the temperature settings and not theirs.

We have looked hard at this response and we feel that the carrier is right because of National Motor Freight Classification ("NMFC") item 360 section 2(e).

Are we interpreting this right, by holding the VENDOR responsible for their negligence per NMFC item 360 section 2(e).

Answer: It is certainly the custom, and always a good practice, to place instructions for protective service on the face of the bill of lading or shipping document.

If the shipment is moving under a Uniform Straight Bill of Lading that incorporates the National Motor Freight Classification, then Item 360, Sec. 2 (e) is applicable:

> Unless otherwise provided in carriers' tariffs, shipments requiring protective temperature control may be accepted subject to the availability of suitable equipment when the bills of lading and shipping orders are clearly and legibly marked in upper-case letters in accordance with the following:
>
> (1) Where shipments are subject to damage from freezing, marking must clearly instruct carrier to protect from freezing.
>
> (2) Where shipments require maintenance at or below a specific temperature, or movement within a range of temperatures, marking must indicate the temperature or temperature range required.

I would only add one caveat. If there was a prior course of business, the carrier was experienced in handling the commodity, and it was obvious from the description of the commodity that it required protective service, then it can be argued that the carrier should have known the shipment had to be carried at a particular temperature, or that it should have refused to carry the shipment. Otherwise, I don't see how you can hold the carrier responsible.

356) FREIGHT CLAIMS - REASONABLE DISPATCH

Question: What type of recourse do we have as a 3PL against a carrier that we have brokered a load to with a specific appointment date. This carrier unknown to us basically double brokered the load. The freight did not reach its destination until 3 days after the specified delivery date.

We spoke with the carrier to which we tendered the load, who lied to us saying he was not able to get in touch with his driver and did not know where he was at that point. He knew at that time he had another carrier pickup the freight.

Please let me know if we are required to pay this freight bill.

Answer: 1. If the services were actually provided, i.e., the load was picked up and delivered, you are obligated to pay the agreed freight charges.

You may have a claim for delay. Although a carrier is normally only required to deliver a shipment with "reasonable dispatch", if a carrier agrees to deliver by a particular date and fails to do so, this would be a breach of the contract. The question then becomes, what if any damages has the shipper suffered?

You have not addressed this in your submittal, so I cannot comment further.

357) FREIGHT CLAIMS - REASONABLE DISPATCH

Question: We have a several orders with a carrier on a "Remnant Rate" special, so we are waiting for them to have trucks that are not completely booked, so they can put on our cargo. I have two questions ...Can they legally take forever to make delivery or can we force them to make delivery within some reasonable time frame. Also what happens if they go out of business while they have our freight (Who is liable to our Customers for their merchandise?

Answer: I am not familiar with the term "Remnant Rate", but it appears to be tied to the service level that the carrier agrees to provide.

You should first note that, in the absence of any other agreement, a carrier is only obligated to deliver goods with "reasonable dispatch" - the usual and customary transit time between the origin and destination for similar shipments.

If you are concerned about delay in the delivery of your goods, about the only suggestion that I can give you is to obtain an agreement in writing with the carrier that shipments will be delivered by a certain date, or that specifies the maximum transit time from the date of pickup. You may want to specify a penalty or "liquidated damages" (such as $100 per day) for shipments that fall outside the agreed period.

As to your second question, the terms of sale with your customer usually determine which party has "risk of loss" in transit. Under the Uniform Commercial Code, it is presumed that if the terms of sale are "FOB Origin" or equivalent, the risk passes to the buyer when the goods are tendered to the carrier.

Conversely, if the terms of sale are "FOB Destination", then the seller retains risk of loss in transit.

I would note that motor carriers are required to maintain minimum cargo insurance (referred to as a "BMC-32" endorsement). This insurance is usually available to shippers if the motor carrier goes out of business, files bankruptcy, etc.

358) FREIGHT CLAIMS – RECOOPERED SHIPMENT

Question: Does motor carrier have a legal obligation to notify either shipper or consignee if a shipment has been "recoopered"?

Recent event: Shipper ships 1 crate: Consignee receives 1 skid, shrink-wrapped; there is no evidence of any external damage and consignee signs for 1 piece "clear". Investigation reveals that 2 pieces are missing from the "crated" shipment. While I believe we are going to reconcile this without difficulty, I am concerned that had the shipment been relegated to inventory rather than opened soon after delivery, we would never have been able to file a claim.

I've searched for something in the US Code, but cannot locate any statute. Most likely there are case precedents???

Answer: Shortages from palletized, shrink-wrapped shipments are a recurring problem.

To answer your first question, there is no legal obligation for a carrier to notify the shipper if a palletized shipment has been broken down and re-wrapped or that a crated shipment has been re-coopered. You can put specific instructions on the bill of lading or, better yet, include appropriate provisions in a written transportation agreement to cover this matter.

Obviously, the best practice is to have the driver count the packages before they are palletized and shrink-wrapped, and to have the driver present when the wrap is removed at the destination. Unfortunately, in order to save time during loading and unloading, this does not usually happen.

If the driver is not able to count packages at origin, carriers usually instruct their drivers to sign for "pallets" instead of a piece count. Likewise, carriers will often only show the number of pallets on the delivery receipt that is presented to the consignee for signature.

Basically, palletized shipments are very similar to SL&C shipments. When there is a shortage the question is whether the goods were actually put on the pallet before it was shrink-wrapped, did the shortage occur during transit, or did the shortage occur after delivery to the consignee.

There is really no statute or regulation that applies to these situations, and the court decisions generally turn on the specific facts. Each case must be investigated in order to determine liability.

359) FREIGHT CLAIMS – REFUSED DELIVERY AND MITIGATION OF DAMAGES

Question: Can a consignee refuse to take delivery of a shipment that has damage? Or can the carrier demand that delivery is required and then the shipper must file a claim?

Fact: carrier attempted delivery but our customer is refusing due to fact there is damage. My feeling is customer is using damage to cancel the purchase order. Do I have to receive cargo in order to file claim?

Answer: First, the consignee can refuse to accept delivery of a damaged shipment. However, there is a general duty to "mitigate the loss", which usually means that unless a shipment is damaged so badly that it is essentially worthless, some reasonable attempt should be made to repair, refurbish, etc.

If the consignee refuses a shipment, then the carrier has a similar responsibility to mitigate the loss, as well as a duty to notify the shipper that the goods are "on hand" and to request instructions as to disposition. The carrier may also have the right, if it complies with the terms and conditions of the bill of lading and/or applicable law, to sell or salvage the goods.

Lastly, there is a question as to which party (seller or buyer) has risk of loss in transit and should be the proper party to file a claim with the carrier. If your terms of sale are "FOB Origin" or equivalent, under the Uniform Commercial Code, the risk of loss generally passes to the buyer upon tender of the goods to the carrier at origin. If the terms of sale are "FOB Destination" or equivalent, the seller retains risk of loss in transit.

360) FREIGHT CLAIMS – REFUSED SHIPMENT AND DUTY TO MITIGATE

Question: We had a truckload shipment that our consignee refused because the trailer was not sealed upon delivery. Our procedure is when the driver came to pick up the load we provide them the seal. We record that number on the bill of lading, which is signed by the driver. On this load the driver forgot to seal the trailer. The consignee refused the load and will not accept

it back because we have no way of determining what might have happened to the load. The attacks of 9/11 have the entire industry very cautious about possible terrorist activities. We are now going to file a freight claim against the carrier for the manufactured cost of the product.

The product in question is plastic cookie trays. The trays are packed in a corrugated box. The boxes are stretched wrapped to a pallet. We haven't done any lab testing at this point but the consignee has said they will not accept the trays unless they have all been 100% inspected.

Our assumption is that the inspection would have to be performed by an outside lab. My guess is that the cost to do this might be greater than the cost of the product?

Do you believe we have a legitimate claim? Also what changes in our procedures would you possibly recommend?

Answer: You can, of course, file a claim with the carrier.

The question is whether the consignee properly refused this shipment, because normally a consignee should accept the shipment unless it is "practically worthless" and has a duty to mitigate the loss (inspect, sort, segregate, test, salvage, etc.)

If the goods were some kind of food product, the consignee might be justified in rejecting the load because of the absence of a seal. For example, there is one recent case in which a truckload shipment was rejected because of a missing seal, *Trucker's Exchange, Inc v. Border City Foods, Inc.*, 998 SW2d 434 (Ct. App. Ark. 1999). In that case, the carrier was held liable when the carrier's driver broke the seal on a reefer shipment of frozen chicken, and the consignee rejected the entire load because of possible contamination.

Obviously 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. However, there a number of factual issues that should be investigated in the event the carrier refuses to pay the claim and argues that the rejection of the shipment was unreasonable or that the claimant failed to mitigate its damages.

For example, you have not indicated how the trays were packaged or whether the packaging was sufficient to protect them against contamination. There is also no reference to any laboratory testing to determine whether there was any odor or other contamination affecting the trays. These issues should be considered.

As to your practice of giving a seal to a truck driver and expecting the driver to apply the seal, I would strongly suggest that this is NOT a good practice. The shipper should always apply the seals to ensure that they are properly applied. Likewise, the consignee should always break and remove the seals.

The only thing I can add is:

1. Make sure the carrier knows the situation and that the trays may have to be destroyed if the cost of 100% inspection is more than what they are worth.

2. See if the customer would agree to a reasonable random (statistical) sampling and testing by a qualified laboratory.

3. See if there is any other (non-food) use for the product.

4. Make sure you document all communications.

361) FREIGHT CLAIMS – RELEASED VALUES

Question: I have a few questions concerning "Released Value" provisions in motor carrier tariffs:

1. Can a carrier show a value limitation for any product, or is there a limiting factor regulating this?

2. Can the carrier determine their own released value for any given product, or is there a standard that they must use?

3. Does a carrier need to list each individual item that they are limiting their liability for in their rules tariff, or can they simply show a released value by class?

In the research that I have done on this subject (including some of your own publications), I cannot find clear answers to these questions. It appears to me that a carrier can create their own limiting value for any given product that they haul, as long as they have something in their rules tariff about it.

Answer: Unfortunately, carriers have a lot of freedom when it comes to liability limitations. Limitations that would never have been approved by the ICC, before it was "sunsetted", are now common.

There are some basic requirements that must be met in order to have an enforceable liability limitation. There must be a bill of lading that either has the liability limitation on its face, or some language that incorporates the carrier's tariff by reference; there must be a tariff that contains a rule with the liability limitation, and there must be a choice of rates for lower or higher liability limits.

Liability limitations are usually stated in $/lb, but sometimes are tied to the National Motor Freight Classification (NMFC) class of the article, or to the discount level.

Since tariffs are no longer required to be filed, and can be unilaterally changed by the carrier without notice to the shipper, we always recommend that shippers enter into properly drafted transportation contracts to avoid these problems.

362) FREIGHT CLAIMS – RELUCTANT CARRIER

Question: We currently have $15,719.35 in outstanding claims with a regional LTL carrier. There are 32 claims dating back to April 2001. We no longer do business with this carrier for obvious reasons, but they will not correspond with any of our inquiries about these claims.

What would be our next step?

Answer: Unfortunately there is no easy way to collect loss & damage claims from a reluctant carrier. Assuming that you have filed your claims in a timely manner and the carrier has failed to pay, your remedy is to bring a lawsuit. You may also be able to collect some or all of your smaller claims from the carrier's insurer if it has a BMC-32 cargo insurance endorsement on file with the FMCSA.

363) FREIGHT CLAIMS – REPLACEMENT SHIPMENT

Question: We shipped an order of fresh product to California and the carrier froze the load. My customer couldn't let their stores be short on product, so they insisted that a replacement shipment be sent by express carrier. I want to know if the carrier should be liable for the UPS charges.

Answer: As a general rule the cost of shipping a replacement shipment would not be recoverable and would be considered "special damages". Thus, your claim would be limited to the damages (invoice price, etc.) on the first shipment - the one that was damaged by the carrier.

This subject is covered in "Freight Claims in Plain English" (3rd Ed. 1995) at Section 7.3.

364) FREIGHT CLAIMS – REPLACEMENT SHIPMENTS

Question: If a claim is filed by a shipper based upon destination invoice price for a given product (freight charges not invoiced separately), and the freight charges have been prepaid by them, is this claimant also entitled to the cost of replacement shipment charges?

I have read the appropriate section in *Freight Claims in Plain English*, but I'm just not clear on this point. It is my understanding that if a carrier pays the claim based upon destination invoice price and the prepaid freight charges have not been invoiced separately, the claimant has been "made whole" for his/her loss on the original bill of lading contract. For example, if the prepaid freight charges are $50.00 and the claim was filed at the destination invoice cost of $100.00 (freight charges not invoiced separately), our payment of $100.00 presumably includes these prepaid freight charges. If we were to also pay the replacement freight charges, wouldn't this construed as a double recovery for the claimant? What if only part of the original shipment was damaged but the cost of a replacement shipment was more than the relative proportion due to carrier "minimum charges"?

Answer: The invoice price to a customer is presumably comprised of the origin ("FOB") price of the goods plus the cost of delivering them to the destination. Thus, 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.

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.

If you have paid the claim based on the invoice price to the customer (or "destination market value"), you should not have to reimburse the shipper for freight charges on a separate replacement shipment.

With regard to a partial loss on a shipment, the invoice price would be prorated accordingly, including any shipping costs.

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.

Remember that 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.

Of course, if you want to be a "nice guy", there is no reason why you can't pay more than you would be legally obligated to pay.

365) FREIGHT CLAIMS – REPORTING CONCEALED DAMAGES

Question: What is the time limit for a consignee to report "concealed" damage. I have a shipment that was delivered February and the consignee notified us last week that there was damage to the (import) goods.

Answer: There is no specific statute or regulation that deals with "concealed damage". The applicable legal principles are found in numerous federal and state court decisions over the years.

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 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.

The mere fact that damage may have been "concealed" is not a defense for a carrier if there is proof that the damage existed at the time of delivery.

"Concealed damage" refers to damage that is not apparent at the time a shipment is delivered. 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.

If you can provide a 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), the carrier should pay the claim.

366) FREIGHT CLAIMS – REQUIRED DOCUMENTS TO SUPPORT

Question: I have a very small claim for shortages in transit filed against a carrier in the amount of $234. The bill of lading ("B/L") shows 215 cases being shipped and signed for by the driver. Upon arrival an exception was made for 21 cases being short. The shipper did a cycle count and they claim there were no overages. The carrier is asking for a copy of inventory records showing totals before, during and after shipment (verifying product did not return to stock at a later date).

This seems like an awful lot of unnecessary documentation which may or may not be available for such a small claim, especially since we can provide an-email message from the shipper attesting to the fact that a cycle count showed no overages, and that product shipped as shown on B/L. Other carriers do not normally ask for this additional proof.

Can a carrier legally require such excess documentation when everything else has been provided to show carrier negligence?

Answer: It would seem to me that if the carrier signed for 215 cases on the bill of lading, and there was a shortage notation of 21 cases made at the time of delivery, that should be enough. I don't have all the facts and circumstances, but it sounds as though the carrier is being unreasonable.

You might cite to them the FMCSA (formerly ICC) claim regulations at 49 CFR Part 370.

367) FREIGHT CLAIMS – REQUIRED RECORDS

Question: Can a carrier request the inventory records from both the shipper and consignee pre and post shipping to prove that something was shipped? Do I have to prove this even if the bill of lading is signed?

Answer: If the carrier's driver was present and had the opportunity to count the cartons at the time of loading and signed the bill of lading with the carton count, that should be adequate proof as to the quantity received at origin.

The carrier can, of course, request additional information or documentation to support a disputed claim, but it would seem unreasonable if the above is true.

I would note that some shippers do have inventory management systems that can generate the type of records that you mention. If this information is readily available it might be advisable to furnish it in order to help resolve the claim.

368) FREIGHT CLAIMS – RIGHT TO INSPECT AND DETENTION FEES

Question: Is there a rule that states a consignee can NOT inspect/open freight when there is no visible or apparent damage to the cartons or container? As a carrier we DO NOT open and inspect any of our shipments, so how could the customer do so?

Answer: Obviously, if there is some exterior indication of damage or shortage, it is advisable to open the carton or container while the driver is still present so that he can verify whether there is loss or damage.

Because "concealed damage" (or shortage) is a fairly common, many consignees want to check the contents of the carton or container at the time of delivery. Then any exceptions can be noted on the delivery receipt.

As a carrier, you should not open the customer's freight (unless there is a question of proper classification of the articles, a HazMat leak, or some similar legitimate reason).

On the other hand, the consignee is the owner of the goods, and has every right to open its own packages or cartons to inspect the contents. The only question is whether it is reasonable under the circumstances to expect the truck driver to wait around while this is being done. If the driver is held beyond "free time", the carrier is entitled to and the consignee would be liable for any detention time fees.

369) FREIGHT CLAIMS – RISK OF LOSS

Question: When making shipments with LTL carriers we sometimes ship freight collect and sometimes we ship freight prepaid. We were always under the assumption that if something shipped freight collect with a customer specified carrier and their delivery has damages that they would need to take that up with the carrier and file a claim, not us.

Is this a correct assumption?

Some of our customers will receive shipments with freight damage or shortages and deduct from our invoices to them. Is this legal?

Answer: It is NOT a correct assumption.

The fact that the shipment was "prepaid" or "collect" does not determine which party has risk of loss in transit and would be the proper party to file a claim for loss, damage or delay with the carrier.

For commercial sales transactions the Uniform Commercial Code 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 once goods are put in possession of the carrier at origin; where FOB place of destination is specified, risk of loss is on the seller during transit, etc. UCC 2-320 covers CIF and C&F terms.

The use of these terms in a purchase order results in a legal presumption as to where title (the "right to possession" in UCC language) passes from the seller to the buyer. This is a presumption, which the parties may change by contract, i.e., agree to a different place or event for the passing of title.

If the agreement between the parties is silent as to the terms of sale and/or risk of loss in transit, the usual presumption is that it will be construed as an "FOB place of shipment" contract, i.e., risk of loss would be on the buyer.

If your terms of sale were "FOB Origin" the risk of loss transferred to the buyer once the goods were loaded onto the truck. Thus, the buyer would still have to pay for the goods if they were lost or damaged in transit, and would have a 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. Thus, it may be a business decision, rather than a legal decision.

370) FREIGHT CLAIMS – RISK OF LOSS

Question: Who needs to file a claim if a full truckload of pickles got frozen while being transported from shipper to receiver? Also, where does the liability lie in this situation?

The carrier missed two scheduled appointments. Fist the carrier had a mechanical breakdown. Second the driver encountered health problems. Overall the delivery was late by a whole week.

Answer: The party that has risk of loss in transit (either the seller-shipper or the buyer-consignee) should file the claim. This is determined by whether the terms of sale were FOB origin or FOB destination. It would appear clear that the carrier is liable based on the facts you have described.

371) FREIGHT CLAIMS – RISK OF LOSS AND TERMS OF SALE

Question: Our shipping terms are FOB Shipping Point. When the carrier delivered a large shipment to our customer, the customer stamped the bill of lading (B/L) "subject to further inspection", but made no specific notations. After delivery, the consignee advised the carrier that they were shorted 2 large pieces. The consignee has since paid our invoice short, stating that the carrier gave them no satisfaction. The freight was delivered by a LTL carrier and there was no seal.

In my opinion, the notation "subject to further inspection" means nothing. It seems to be the lazy way of putting off the consignee's responsibility. The freight is either there or it's not when delivered.

This happened 1 year ago so there is no chance of any claim resolution. I would like to be clear so I can advise our consignees of their responsibility regarding shortages.

Answer: My first observation is that your customer should not have deducted for the shortage. Under the Uniform Commercial Code there are certain presumptions about "risk of loss" based on the terms of sale specified in the sales contract. UCC 2-319 provides that where FOB place of shipment is specified, risk of loss passes to the buyer once goods are put in possession of the carrier at origin. Thus, even though there may be loss or damage in transit, the buyer is still legally obligated to pay for the goods.

In order to prevent this in the future, my best advice is to provide clear instructions to your customers on the proper procedures to follow when there is shortage or damage on delivery. You may also want to be more specific in your quotations and proposals, so that there is no misunderstanding as to the duties and responsibilities of the seller and buyer.

372) FREIGHT CLAIMS – RISK OF LOSS FOR LATE DELIVERY

Question: A shipment made freight collect to our customer was refused at destination due to late delivery. What is our obligation (IF ANY) to file the claim with trucking company?

Answer: The fact that the shipment was "freight collect" does not determine which party has risk of loss in transit and would be the proper party to file a claim for loss, damage or delay with the carrier.

The Uniform Commercial Code establishes certain presumptions about "risk of loss" based on the terms of sale specified in the sales contract. UCC 2-319 provides that where FOB place

of shipment is specified, risk of loss passes to the buyer once goods are put in possession of the carrier at origin; where FOB place of destination is specified, risk of loss is on the seller during transit. These presumptions can be varied by the parties in their contract.

If we assume that your terms of sale were “FOB destination” or equivalent, then you, the shipper, should be the party to file the claim with the carrier.

Now, I must observe that there is another issue here. In the absence of special circumstances, a carrier is only required to deliver with “reasonable dispatch”, so that a “late delivery” is not generally a proper grounds for refusing delivery by the consignee. This is a matter that should be brought up with your customer.

373) FREIGHT CLAIMS - RISK OF LOSS

Question: We deal with a major supermarket chain that sent its own carrier to our warehouse to pick up some small shipments. The supermarket debited us on three of these shipments. On each of these loads the carrier signed with his name and then the notation “STC”. The letter from the chain stated that this notation meant “Said to Contain”.

Since the supermarket was paying the freight “FOB Shipper- Freight Collect”, who is responsible? I thought if they had issues it would fall back on the carrier. We cannot file a claim because the bill is collect.

Answer: For commercial sales transactions the Uniform Commercial Code 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 once goods are put in possession of the carrier at origin.

If your terms of sale were “FOB Shipper” the risk of loss transferred to the buyer once the goods were loaded onto the truck. Thus, the buyer would still have to pay for the goods if they were lost or damaged in transit, and would have a claim against the carrier.

While the risk of loss is on the buyer, the claimant must be able to show that the goods were tendered to the carrier in good condition, and that is where the “STC" notation (which does mean “said to contain”) becomes relevant. If in fact the driver was not able to observe the loading, you will have to provide the proof of the quantity and quality of the goods loaded. This can usually be done with an affidavit by someone with first hand knowledge.

374) FREIGHT CLAIMS - SALES TAX INCLUDED IN DAMAGES

Question: We recently delivered 2 motorcycles that were damaged by the poor handling of our driver, so we are definitely responsible for repair costs. The claim consists of a list of itemized parts with the cost of each, plus labor to repair. My question is this: they have added sales tax to the parts prices, must we be responsible for sales tax?

Answer: Since the claimant apparently took reasonable steps to mitigate the loss by repairing the motorcycles, it would be entitled to its “actual loss” in connection with the repairs. If it was necessary to pay sales tax in order to purchase the replacement parts that were used to repair the motorcycles, that would be a proper part of the claim.

375) FREIGHT CLAIMS – SALES TAX

Question: Where can I find a document or reference to better explain to a claimant the carrier's liability when it comes to sales tax? Unless supported by means of paid invoice, or in the case of federal excise taxes (i.e. alcohol, tobacco, tires) it is our understanding that the carrier is not responsible for sales tax and that the carrier is not to be billed as if it were the claimant's customer. However, just stating this is not acceptable to some claimants, and a better source of reference would be very helpful.

Answer: A loss and damage claim to a carrier is not a "sale", so there is no sales tax on the claim amount, per se.

On the other hand, a claimant is entitled to recover its "actual loss" under the Carmack Amendment, 49 U.S.C. 14706 and the relevant court decisions. Thus, you have to look at the measure of damages to see if it reflects the claimant's "actual loss". If goods have been sold to a buyer and are lost or damaged in transit, the normal measure of damages would be the invoice price (including any sales tax charged by the seller to the buyer). I am assuming, of course, that the sales tax would have to be collected and/or remitted to the taxing authority even if the goods were lost or damaged in transit.

376) FREIGHT CLAIMS – SALVAGE ALLOWANCE

Question: We are a 3rd party logistics company. If our customer refuses to allow the salvage of their products do they still have to pay a salvage allowance?

If another customer of ours allows their product to be salvaged, does the carrier have the right to withhold the costs of disposing the products and return the remaining to our customer?

Answer: You have not provided any details as to the type of product involved or the kind and extent of damage, so I can only give you some general rules.

1. As a general rule, there is a duty to "mitigate damages". This usually means that damaged items should be inspected, tested, repaired, repackaged, etc. if it is reasonable under the circumstances to do so.

Whether these expenses are "reasonable" under the circumstances is a factual question and would depend on the value of the item. In addition, the manufacturer or seller may have a legitimate concern about the product quality, potential product liability, and injury to its reputation and trademark.

Depending on the type of product involved, it may be reasonable to destroy the item without any salvage, in which case there would be no salvage allowance.

2. If the shipper allows the carrier to retain the damaged product for salvage, the carrier may deduct its reasonable expenses from the salvage proceeds.

I would note that the subject of "mitigation of loss" is covered in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.1.4.

377) FREIGHT CLAIMS – SALVAGE ALLOWANCE WHEN LIABILITY LIMITED

Question: In the past, we have filed claims as "full actual loss" with invoice value as the measure of loss. Some of our customers are now contracting carriers under a limited liability of $25 per pound per piece with maximum liability per shipment depending on mode.

We file claims for invoice cost, but the invoice cost is greater than the limited liability that the carrier will pay. We will then amend the cost to the carrier's contracted liability. Under these circumstances, is the carrier entitled to have a salvage deduction, since they are not paying the full cost of the product? Is the carrier entitled to a salvage allowance if they are not allowed to keep the product? Are we allowed to add freight charges to the claim?

Answer: Each claim must be evaluated on the specific facts and relevant documents, but here are the general rules.

Salvage: If you file a claim for the invoice price, and there actually is some salvage, the net salvage proceeds should be deducted from the claim, since that is your actual loss. If there is no salvage, then there is no "salvage allowance".

Freight charges: If the invoice price is a "delivered" price, it presumably includes the cost of transportation to deliver the goods to the customer (i.e., freight charges). Thus, your claim based on the invoice price already includes freight and it cannot be claimed twice.

Liability limitation: Assuming that the carrier has an enforceable liability limitation, that amount multiplied by the weight of the shipment is its maximum liability.

Your claim is for the full invoice value of the goods, less any actual salvage.

If that amount is more than the carrier's enforceable liability limitation, then the limit amount is all you can collect.

If that amount is less than the carrier's enforceable liability limitation, then you can collect the full amount of your claim (invoice less salvage).

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379) FREIGHT CLAIMS – SALVAGE ALLOWANCE

Question: I recently became Traffic Manager at my place of employment and am in the process of clearing up past claim issues. I have come across one that was signed for as damaged and originally mailed in March of last year. This item was returned to us in August of 2001, I think. Some correspondence had taken place, the last being a letter to the carrier in January of this year stating that this item had no salvageable value to us, our customer, or the

vendor. I have spoken with the claim representative who said that IF they pay the whole amount they will want the item. Unfortunately, now I cannot seem to find the item. I believe it was thrown away due to space restrictions. Is there a time limit that you are required to keep the item? And if so, what is a reasonable formula to try to mitigate the cost on this?

Answer: Normally, if the carrier pays the claim at the full invoice price, it would be entitled to take the damaged item and try to salvage or sell it to recoup some of the loss. What would be recovered, of course, depends on the item, its condition, and whether there is a market for this kind of distressed goods.

Since I don't know what kind of item was damaged or whether it was salvageable, all I can suggest is that you try to negotiate some mutually agreeable salvage allowance.

For the future, if you intend to dispose of a damaged item, you should first notify the carrier (in writing), and give them a reasonable time to take action. I would note that there is a growing body of law that deals with "spoliation of evidence" and you could be barred from pursuing your claim if you have destroyed the evidence.

380) FREIGHT CLAIMS – SALVAGE AND MITIGATION OF DAMAGES

Question: I am unclear as to who would own the product in the event a claim is filed/paid.

A full truck of machine parts was damaged in an accident. The parts were put into buckets: 1 completely damaged/unsalvageable and 2. salvageable with some work put into them.

As for the completely unsalvageable parts, if the carrier pays for the full market value of them, would they be entitled to the product? Would the shipper be able to provide a Certificate of Disposal and submit it to the carrier versus turning the product over? The main concern is that this is a branded item and they do not want to turn over damaged goods with their company name on them. I am assuming they would be able to recoup the disposal fees into the claim amount? Is there any harm in the company disposing of the product before the claim is filed?

As for the salvageable bucket, they intend to fix (and include all the costs to do so in their claim) and resell so the carrier will have no right to these items.

Answer: As to the parts that you describe as "completely damaged/unsalvageable", if they cannot reasonably be repaired or remanufactured for their intended purpose, and could expose your company to a risk of product liability, I would say that you have a right to destroy or dispose of them,

The only caveat is that there is a legal duty to "mitigate damages", which usually means that there must be reasonable efforts to salvage damaged goods. In order to avoid a claim by the carrier that you failed to mitigate damages, I would advise you as follows:

A. Notify the carrier (in writing) and request that it conduct a joint investigation and inspection of the damaged parts. Also tell them that you will hold the parts only for a specific time (say 30 days) after which you may dispose of them. Do NOT dispose of the parts before the specified date.

B. If the carrier does not conduct a joint investigation or disagrees with the extent of the damage, have a qualified Quality Control person or an independent agency inspect the damaged parts and provide a written report specifying the extent of the damage and the reasons for concluding that the parts cannot be repaired and re-sold. If the material from which the parts is made has a salvage value as scrap metal, you probably should try to sell the material as scrap and apply the salvage proceeds against your claim. If the parts are disposed of without any salvage, you should be able to include disposal costs in your claim.

381) FREIGHT CLAIMS – SALVAGE AND MITIGATION OF DAMAGES

Question: Our company shipped a pallet truck to a customer. The truck was refused as damaged, and returned to our warehouse. We sent the truck back to our supplier in order to receive a credit back. The supplier issued us a partial credit, as there were considerable costs involved in repairing the truck to make it saleable. We subtracted the amount credited by the supplier from the total value of the truck, and filed a claim with the carrier for the difference, plus freight charges. The carrier is asking for an additional salvage credit because we did not give them the truck for salvage. Is there any regulation that would support our position that we already fulfilled our duty to mitigate the loss by securing a credit from the supplier?

Answer: There is no "regulation" that governs the measure of damages in a freight loss or damage situation, but there is a body of law that has developed over the years in the court decisions, see *Freight Claims in Plain English* (3rd Ed. 1995) at section 7.0.

From your description of the facts, it would appear that the amount that you have claimed (invoice price less the credit from the manufacturer) is the proper measure of damages.

You had no legal obligation to give the damaged pallet truck to the carrier and to authorize it to sell or salvage it, and you appear to have taken reasonable measures to mitigate the loss.

382) FREIGHT CLAIMS – SALVAGE AND TITLE

Question: We loaded a "floor loaded" shipment on a drop trailer. This trailer was loaded and sealed by the shipper. The load was delivered to a Cold Storage acting as an agent for the receiver. The load was partially unloaded. The refrigerated trailer was in a door for about 5 hours with the doors open. The load was then re-routed by the receiver to a 2nd Cold Storage about 2 hours away. The reefer, which was running up to the point the trailer left the first cold storage, arrived at the second cold storage not running. The product was determined to be warm and the truck was sent back to the carrier's yard in Chicago. At this point, to whom does the cargo belong? In other words, who owns it? If the shipper has determined the product is no longer saleable, can the shipper have it destroyed and still file a claim against the carrier?

Answer: I'm not really sure you gave me enough facts, but here are some basic principles.

1. 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. Without seeing the purchase agreement, I cannot give an opinion as to which party would have risk of loss under the circumstances described.

2. Even though the goods may have been rejected to the carrier, this does not affect the ownership. The carrier does not own the goods (unless it has paid a claim and been given the right to salvage the goods).

3. It would appear, from your description of the facts, that there may be carrier liability for the damage to the reconsigned (2nd) shipment, if the reefer unit was not working at the time of delivery. I would note, however, that the claimant would have to prove that the damage had not taken place before being tendered to the carrier for the reconsignment.

383) FREIGHT CLAIMS – SALVAGE TIME LIMITS

Question: I found that the carriers are not picking up the salvage within a reasonable time frame. They will, after 6 months, expect the salvage to still be available. Then, because it isn't

available, they will deny the claim on that basis. Is there an amount of time that is past reasonable that I can use to respond to these denials?

Also, I would like to include some verbiage on our claim form to put the carriers on notice that the salvage is available for pick up and they have 90 days to do so. Would that be adequate and alleviate some of these denials when the salvage is no longer available?

Answer: Assuming that you are dealing with a carrier that is a participant in the National Motor Freight Classification, 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 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. Also remember to document any proceeds from the salvage, as the carrier will be entitled to an offset against the claim.

384) FREIGHT CLAIMS - SEALED LOAD

Question: One of our carriers picked up a load and sealed it. Once it got to the place of delivery the consignee said one pallet was crushed from having a pallet above it, and the customer wants the carrier to be liable for the damage. They say they would never double stack pallets where this could occur. What do you think? Do you think the customer has ground for carrier liability on this?

Another question I had was, once the product got unloaded one of the cases in the pallet had hot sauce that broke therefore they were leaking. Customer is blaming carrier for this too. Even though there was no proof in the trailer that anything had been leaking. It clearly occurred while being unloaded or began leaking after it got unloaded. Who do you think should be held liable for this?

Answer: If the carrier was present and had an opportunity to observe the loading, and the trailer was sealed at the conclusion of the loading, then the carrier cannot shift the liability to the shipper for improper loading, blocking, bracing, etc.

If this was a true "shipper load & count" shipment and the carrier did not have opportunity to observe the loading, then the carrier might have a defense of improper packaging or loading by the shipper (an "act or default of the shipper"). However, the carrier would still have the burden of proving that it had not been negligent.

385) FREIGHT CLAIMS – SETOFFS FOR DELAY

Question: We have a customer that files delay claims, but refuses to supply supporting documentation. When a delay occurs, they send us an incident report and ask us to respond. If we affirm that we were late and at fault, although we may disagree with the length of time of the delay, then an invoice is sent to us and payment is expected. The invoice will state total charges due, but may show only that the truck was 2 hours late or a more 'detailed' invoice will show number of men, hourly wages and length of delay time. No other supporting documentation is provided (time cards, etc.).

If we deny being late, but the consignee charges back our customer for a delay, we are invoiced anyway.

Many times the bill of lading ("B/L") will not indicate a late delivery or show a specific delivery time.

Our customer refuses to provide additional documentation and will offset our freight charges after 60 days. The contract allows this, but it also requires that they provide documentation.

They are telling us to pay the claims, without negotiations or compromise or lose all their business.

How can we resolve for a win-win?

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

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

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

386) FREIGHT CLAIMS – SHARING A TRAILER

Question: We employ a truckload firm to move goods from our warehouse in El Paso, Texas to our distribution point in Indiana on a regular basis. To "optimize the cube" we are considering partnering with a local Indiana business with which we have no competition issues, who has vendors in El Paso such that they buy our open space, as needed, in our truckload shipments as opposed to paying currently high LTL rates. Essentially, they reserve a specified

number of skid spaces in advance, provide us a bill of lading for their contribution covering the truckload portion of the move, have the vendor deliver to us, and we stage their goods and then load them with ours.

In the above situation, should damage occur to their product, under what conditions/circumstances would we be liable, rather than the carrier?

What terms of carriage should be used on the contributor's bill of lading?

Should we or should we not use a trailer seal?

Answer: Let me try to answer your questions in the order presented:

1. In the above situation, should damage occur to their product, under what conditions/circumstances would we be liable, rather than the carrier?

You could have some liability for damage if it was caused by your negligence in preparing, packaging or loading the shipment. Otherwise, the carrier should be responsible for loss or damage in transit.

2. What terms of carriage should be used on the contributor's bill of lading?

I would suggest that the carrier issue a separate bill of lading to the "contributor" for its shipment. Your company is not the owner of the goods, and should not be shown as the shipper or consignee on the bill of lading. If necessary, you could be shown as "c/o" or some equivalent.

3. Should we or should we not use a trailer seal?

Yes, but you should recognize that seal integrity is only meaningful up until the time the seal is broken for the first time, usually at the first stop-off. If there is shortage at some later point it is usually difficult to determine where the loss occurred.

387) FREIGHT CLAIMS – SHIPMENT FROM CANADA

Question: How can I determine liability for a shipment originating in Canada on a through bill of lading, which was damaged on its way to New Jersey somewhere in the US? I know that Carmack doesn't apply, but what does?

Answer: A shipment from Canada to the U.S. would ordinarily be governed by the Canadian motor carrier bill of lading, the terms and conditions of which are prescribed by provincial regulations. Under Canadian law, the liability of the carrier is limited to $2.00 (CD) per pound unless the shipper declares a value and pays an additional charge.

388) FREIGHT CLAIMS – SHIPMENT REFUSED AFTER STATE TROOPER BREAKS SEAL

Question: I have a $18,000.00 cargo loss which resulted when the driver for a 3rd party freight carrier was pulled over for failure to maintain posted speed limit (a citation was not issued). The Georgia State trooper requested an inspection of the cargo trailer. After being advised by the driver as to the contents of the trailer, being presented with a bill of lading, and being advised that the load was sealed, the trooper responded to the driver that he would sign the back of the seal, and proceeded to search the trailer with the driver's consent. The load was rejected at our distribution center, as the seal was broken.

We presented a claim to the freight carrier's insurance company who has denied the claim stating that they feel their driver's actions were not negligent, but a reasonable act of compliance to public authority.

The Georgia State patrol has the authority to break seals and is immune from any liability associated with a law enforcement action. Further, in Georgia an individual cannot be detained for refusing an inspection of their vehicle. If the driver had not consented to breaking the seal

he would have been allowed to go on his way. The state patrol also has video documentation of the driver consenting to the inspection.

Do I continue to have a valid claim against the freight carrier? Would not the negligent act have been the driver's failure to maintain lawful speed?

Answer: First, there is a question as to whether the consignee should have accepted the load instead of refusing it. The carrier will undoubtedly argue that the consignee had a duty to "mitigate the loss", i.e., that the mere absence of a seal is not a sufficient reason for rejecting a shipment, and the consignee probably should have at least inspected the shipment to see if there was any damage or shortage.

Second, if the shipment moved under a Uniform Straight Bill of Lading, the carrier will probably rely on Section 1 (b) of the Terms & Conditions which provides:

> (b) No carrier shall be liable for any loss or damage to a shipment or for any delay caused by an Act of God, the public enemy, THE AUTHORITY OF LAW, or the act or default of shipper...." (emphasis added)

Third, any alleged damages resulting from the rejection for lack of a seal alone could be considered "special or consequential" damages for which the carrier would not be liable. In order to hold the carrier liable, the shipper would have had to give clear notice at the time of shipment that the shipment would be refused it there was no seal, and what damages would result therefrom, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3.

Fourth, you do not indicate how you arrived at $18,000 in damages. Was this the full invoice value of the goods? What was actually wrong with the shipment? Did the consignee reject the shipment solely because the seal was broken, or was there shortage or damage reported at the time of delivery? Was there any attempt to salvage the goods or to mitigate the loss?

389) FREIGHT CLAIMS – SHIPMENT REFUSED DUE TO SHORTAGE

Question: We have had a long-term relationship with a manufacturer and one of their distributors. Due to some initial shortages discovered after the fact in shipments directly from the manufacturer and because of the lengthy delays in resolving them we began inspecting shipments at the time of delivery. In the event there was damage or shortages we refused the shipment.

We are now in a confrontation with the manufacturer/distributor over some refusals which have been credited. These involve transactions months ago. They're suggesting the shortages are a result of our inspections.

1) Instead of bringing these to our attention at the time they're bringing them up in some cases 9 months later.

2) Due to the length of time it's next to impossible to reconstruct the facts.

3) They credited invoices and now want to revisit this.

4) If they fail to inspect on return and then attempt to pass on the problem at some later date, what liability do we have?

Answer: The problems with your vendor appear to result from poor communication and/or inadequate procedures for dealing with loss & damage problems. I would suggest that any loss/damage noted at the time of delivery should be carefully and thoroughly documented; you might want to take Polaroid photos, etc. I would also observe that you really shouldn't reject a damaged shipment back to the carrier unless the goods are substantially worthless; if not, it is a better practice to hold the shipment and attempt to mitigate the loss (repair, repackage, salvage, etc.)

390) FREIGHT CLAIMS – SHIPPER LOAD & COUNT WITH SEAL

Question: A shipment of 8 skids of machinery was loaded in good order onto a truckload carrier's trailer with the driver's assistance. The driver did not take any additional action to secure the load or provide or use any special equipment to help secure the load, like load bars, strapping, decking, etc. When the shipment was delivered it was signed for as damaged. One of the units was damaged due to bouncing around the trailer while in transit. The carrier has denied the claim on the basis that they are not responsible for securing the freight and they are not required to provide any special equipment to secure the freight when the shipper loads the freight.

Under the Carmack amendment, the carrier is liable for the full actual loss, damage or injury caused by them. Since the shipment was tendered to the carrier in good order and arrived damaged at the consignee, it was the carrier's responsibility to secure the load if they felt it was required. There were built in load bars in the trailer. The value of the shipment was $118,000, the repair cost of the damaged unit is $13,140.26. The carrier claims since it was loaded by the shipper and the seal was intact at delivery that that somehow protects them. The seal would only suggest that the shipment was not handled or moved, but does not protect against reckless driving or the seal just being removed. Damage at time of delivery was reported to Dispatch at carrier. Can you offer any additional insight or transportation law, recent rulings that address this situation?

Answer: You have correctly assessed the situation, and I can only add the following observations.

1. If the driver was present and had an opportunity to witness the loading of the equipment it is not a "shipper's load & count".

2. The fact that the seal was intact at the time of delivery is only evidence that the trailer was not opened during transit. In other words, it would only be relevant if there was a shortage.

3. The carrier has the duty to insure that the shipment is properly secured in the trailer. This duty is reflected in the FMCSA safety regulations, see e.g. 49 CFR 392.9 and 393.100.

I would note that these subjects are fully covered in *Freight Claims in Plain English* (3rd ed. 1995).

391) FREIGHT CLAIMS - SHIPPER LOAD & COUNT

Question: Our company ships primarily to retailers and home centers nationwide F.O.B. origin (our plants). More and more of these retailers are inserting verbiage into their Routing Guides that any shipments that are tendered to their carriers are tendered as "shipper load & count" (SL&C") and the drivers are not required to count packages. Part of the back drop has to do with the hours of service rules changes and limitations on the free time associated with it. In addition, some carriers are charging the ultimate consignees a counting and/or waiting fee.

My problem is that if the carrier does not sign for what I physically tender to them, I am ultimately liable if there is a claim for shortage at the delivery.

Please advise any thoughts that you may have on this subject because as a shipper I am extremely vulnerable.

Answer: The subject of "shipper load & count" has come up many times in previous "Q&A's".

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

It is quite understandable that carriers would not want to accept responsibility for a particular count if their driver does not have reasonable access and an opportunity to verify the count

during the actual loading by the shipper. Likewise, if the goods are palletized or shrink-wrapped before the driver arrives, so that the individual cartons are not visible or cannot be counted, the carrier cannot be expected to sign for a carton count.

Obviously there are factual questions when shortages arise, and the problem is exacerbated if the carrier is dropping trailers for both loading and unloading.

If the shipments are actually "SL&C" and the trailers are sealed at origin, the thing to remember is the claimant's basic burden of proof.

You must prove with competent evidence (statement or affidavit from an employee having actual knowledge, shipping documents, loading tallies, etc.) what was actually loaded into the trailer at origin. Likewise, there must be competent proof that there was in fact a 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.

392) FREIGHT CLAIMS – SHIPPER LOAD/CARRIER COUNT

Question: I am handling a claim where the carrier was to transport a dedicated load to the consignee. There is a contract in force with the logistics company and the carrier stating that all loads are shipper load/carrier count ("SL/CC"). A reefer unit was dropped off at the Shipper's facility to be loaded for the next transport. Our driver picked up a sealed reefer unit and when he got to the destination, the cargo count was short. We have now been presented with the value of the missing cargo and the logistics company has stated that the contract agreement supersedes any "convenience factor" offered by the shipper to the carrier. In addition, despite the contractual language, there is apparently nothing noted on the bill of lading ("B/L") issued by the shipper that would indicate that this was a SL/CC.

Given these facts, our question is as follows:

Is the carrier still liable for the shortage of cargo even though the B/L does not specify SL/CC and the driver picked up a sealed trailer?

Answer: I really don't know what you mean by a "convenience factor" offered by the shipper to the carrier, but the question of carrier liability for a shortage under the situation you have described is essentially a factual question.

The claimant (shipper or consignee) has a basic burden of proof: to establish by competent evidence the quantity and condition of what was tendered to the carrier at origin and what was actually delivered at destination.

Ordinarily, if a carrier receives a sealed trailer at origin and delivers it with the seal intact at destination, and there is no evidence of tampering with the seal, locks, hinges, etc. there is a strong presumption that the shortage did not occur in transit. This obviously places a more difficult burden on the claimant.

I would note that a notation or absence thereof on the bill of lading does not conclusively determine liability. The usual issue is whether the driver was present and actually had an opportunity to count the packages as they were loaded; again this is a factual question.

393) FREIGHT CLAIMS - SHORTAGE ON SHRINK-WRAPPED PALLET

Question: We are a demand chain management company. We often purchase directly from a supplier and arrange for transportation from the supplier to our customer. In this case we had a truckload carrier pick up product from the supplier. The carrier signed the bill of lading ("B/L")

indicating 1200 cases (preprinted) and then 50 pallets (hand written). The carrier made the delivery to our customer, who signed the B/L 50 pallets "said to contain" 1200 cases.

The customer has now short paid our invoice, providing an internal receiving document indicating 96 cases short (this would equate to 4 pallets of product). We arrange for the transportation and are responsible to pay the shipper for the product. By marking the B/L "said to contain" our customer believes it has the right to inspect the shipment after delivery.

I am waiting for the carrier to respond to the claim, however I anticipate its position will be to deny the claim based upon the signed delivery of 50 pallets and the driver's inability to verify the piece count.

Who is liable in this situation and how should I manage this type of exposure in the future?

Answer: Unfortunately, this is becoming a very common problem. When cartons have been counted and loaded by the shipper on a pallet, and then shrink-wrapped, it is often impossible for the driver to verify the count. Carriers understandably do not want to take responsibility for a specified number of cartons unless the driver has had an opportunity to count what is on the pallet. Many carriers now direct their drivers to sign only for a pallet count when goods are tendered on shrink-wrapped pallets.

The uniform straight bill of lading contains the language: "Received... the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown)...."

I am not aware of any court decisions that expressly deal with the carton vs. pallet issue, but basically, the issue comes down to your burden of proof. In a shortage situation, the claimant has the burden of proving what was actually tendered (number of pieces) to the carrier at origin, and what was actually delivered. Obviously you have a factual question as to what the carrier received and what it delivered, and further investigation is required.

You should start with the supplier and get verification as to how the product was counted and palletized, whether it was shrink-wrapped or banded, whether the driver was present during the loading and had opportunity to count the packages and/or pallets, whether the trailer was sealed, etc.

You should then ask similar questions of the consignee. Since the consignee signed for 50 pallets, you should find out whether there was evidence that any pallets had been broken down or re-wrapped, and where the shortages were located.

394) FREIGHT CLAIMS – SHORTAGE ON SHRINK-WRAPPED SKIDS

Question: Our carrier signed for 3 shrink-wrapped skids at time of pickup. The bill of lading ("B/L") read "1 skid 140 cartons" of product for each of the three items shipped.

The consignee signed for 3 skids, but also on the delivery receipt showed 100 cartons short of one product. The driver also signed over-short report of consignee as being 100 cases short. My customer is requesting we pay them the $1,060 for the missing product. The product was stacked 10 x 14 cases high.

The carrier we used for this shipment has denied our claim stating that the consignee received the three shrink-wrapped skids the B/L called for. This is a normal carrier response on these claims. It is my understanding that if freight is layered in even layers it is the driver's responsibility to count the product if the B/L shows the amount of cases.

Answer: From your description, it appears that the driver may not actually had an opportunity to count the cartons at the time he picked up the three skids, even though the bill of lading read "1 skid 140 cartons" for each of the three items shipped, and that the driver only signed for three skids.

It also appears that both the consignee and the driver agreed that there was a shortage at destination (so that is not your problem).

The question is one of fact: what was actually tendered to the carrier at origin.

Since there seems to be some ambiguity between what the driver signed for, and what was written on the bill of lading, the shipper should be asked to provide additional evidence. This can be done with a written statement from the shipping supervisor or person with actual knowledge - who actually loaded the cartons on the skids and was present when they were shrink-wrapped, as well as with other shipping records (checklist, manifest, inventory check, etc.).

If it can be shown that the full quantity was actually shipped, then the carrier should pay the claim.

395) FREIGHT CLAIMS - SHORTAGES FROM SEALED TRAILERS

Question: We are a brokerage company, and we have contracts that hold us harmless from any loss, but this one company that we deal with constantly files claims for shortages. They load the trucks, and then seal them. The consignee unloads the trucks and is supposed to note whether or not the seal is intact. The driver is not allowed to make the seal notation.

Sometimes the consignee does note the seal condition, other times they just circle the seal number but still not acknowledging it. However I have noticed that whether the seal is intact or not, they still have shortages on almost every single delivery. Sometimes the carrier does break the seal, as they have other loads that they are picking up or the barn door is off its track after loading, but they do reseal the truck with there own seal. If I can prove that there are shortages regardless of whether the seal is intact or the carrier breaks the seal or not, where would the liability fall during a claim. Is it possible to deny such claims based on the history of shortages?

Answer: If the trailer was sealed at origin and the seal was intact at the time of delivery, it is strong evidence (a “rebuttable presumption”) that the shortage did not occur in transit. However, it is known throughout the industry that seals are not foolproof and it is possible to remove cargo from a trailer or container and still have what appears to be a good seal at destination.

If the shipper can prove, with appropriate evidence or testimony that the goods were actually loaded at origin, and the consignee can likewise prove that there was a shortage at the time of delivery (and not afterwards), the presumption can be rebutted, and the carrier should be liable.

I note that we have recurring complaints about shortages on dropped trailer shipments, whether they are DL&C or SL&C. There is growing suspicion that some of these shortages may be taking place after delivery of the trailer, i.e., that there is either theft at the consignee’s premises or that the goods are not properly being checked in when the trailer is unloaded. If you have a recurring problem with a particular consignee or location, you may want to ask their security people look into this.

396) FREIGHT CLAIMS - SHORTAGES

Question: We have filed several claims for shortage where the customer has short paid our invoice because they do not show receiving the shipments and the carrier cannot provide a valid proof of delivery signed by the consignee.

Some carriers have declined our cargo claims simply stating that they do not bear any liability for the shortage. Some have offered to show printouts of their internal screens showing the driver was present at the consignee on a specific date and time, however they are unable to provide a valid signed proof of delivery.

We have provided a Bill of Lading signed by the carrier at the time of pickup with our claim, to prove that the carrier did have possession of the shipment, as well as proof of the dollar value for the loss.

Answer: There is no "legal" requirement for a carrier to provide a proof of delivery, unless, of course, you have a written transportation agreement with the carrier that contains such a requirement.

Remember that the claimant has the burden of proof as to the quantity and condition of what was received by the carrier at origin, and the quantity and condition of what was actually delivered at destination.

Obviously a notation of shortage on a bill of lading or delivery receipt, made at the time of delivery, is the best evidence that certain items were not delivered. However, if this is not available, the consignee's overage, shortage & damage reports or similar receiving records and/or a statement from the consignee as to the facts surrounding the shortage may be used, and submitted with the claim.

397) FREIGHT CLAIMS – SL&C

Question: We tendered 2 stretch wrapped pallets (STC 106 pcs) to one of our carriers in accordance with our shipper load and count agreement. Per our contract, the carrier has 24 hours to submit an exception notice if there is a discrepancy with the shipment at its first break point. No exception was reported. The shipment arrived at destination showing 2 shrink-wrapped pallets intact but the consignee noted that the piece count received was 54 (1 pallet) and short 52 pieces (the second pallet). We filed a claim with the carrier assuming that the specific notation of a case shortage would take precedence over the notation that two intact pallets were delivered. But, alas, our claim has been declined. We have no way of determining if the carrier broke our pallets, lost one, and then recouped by building two pallets at the destination terminal before delivery. Our questions are:

Is there an order of precedence when the notations on a delivery receipt are in conflict with each other?

What recourse to do you suggest?

What "tips" can you offer for avoiding this situation in the future?

Answer: I don't have a copy of your "shipper load and count agreement", but tendering stretch wrapped pallets is not normally the same as tendering an "SL&C" shipment. The term "SL&C" is generally applicable only where the shipper loads (and often, seals) a full trailer or container, without the carrier's driver being present.

In any event, as with all shortage claims, the claimant has the burden of proving what quantity was shipped and what quantity was received. The description on the bill of lading (e.g., "2 pallets") has evidentiary value, but such presumptions are rebuttable with proper proof.

What you need is statements or affidavits from the persons who had actual knowledge of the carton count that was shipped at origin, and the carton count that was received at destination.

You may also have picking lists, stroke tallies or other documents kept in the ordinary course of business. Get these and re-submit your claim to the carrier.

One inexpensive suggestion for stretch or shrink wrapped shipments is to use a distinctive wrap or tape with color-coded markings. This makes it easier to determine if the pallet has been broken down and re-wrapped by the carrier.

398) FREIGHT CLAIMS – SMALL CLAIMS COURT

Question: We have a number of concealed damage claims that the carrier is refusing investigate. Is small claims court an acceptable way to proceed?

Answer: Small claims court could be appropriate, but you have to check your local court rules to find out: (1) what is the jurisdictional limit for that court and (2) whether a corporate plaintiff needs to appear by attorney or whether an officer of the corporation can appear.

399) FREIGHT CLAIMS - SPECIAL DAMAGES

Question: Recently, a carrier transporting our product had an accident. The driver went around a corner and the driver laid the truck on its side. The product on the truck was a load of door glass. Needless to say, we had some damages.

Aside from the truck wreck and subsequent damages, the real problem was the delay in getting our product back from the accident recovery firm. It appeared that the insurance company contracted with this firm for the accident clean up and product recovery and were not happy with the cost that the recovery firm charged them. The insurance company delayed settling with them for almost two months.

This two-month delay had us in a bad way because most of the product on the truck was for a large customer and it fines their vendors for any late orders.

We were on the phones daily with the carrier and the insurance company stressing the importance of getting this product released so we could examine it to see what was salvageable and what had to be reworked and/or replaced. We also continually warned both the carrier and the insurance company that if we do not get access to our product that we would be forced to have to airfreight replacement product from our supplier in China and that these costs would be excessive. Needless to say, the delay did force us to have to airfreight some of the damaged product from our China supplier due to time constraints.

The value of the load was $100,057.64, however, we only sustained $47,768.19 in damages and recovery costs. We also incurred $19,468.86 in airfreight costs for product we had to replace via our China supplier. I have a breakdown below:

Summary of Claim

Total Value of Goods Lost - $44,227.46

Freight Cost from Western to Salvage Dealer - $607.00

Freight Cost from Western to ODL - $750.00

Total Rework in Gallatin - $600.00

Total Rework in Zeeland - $1,333.73

Pallets Used for Repackaging - $250.00

Freight Claim for Critical Panels from Accident - $19,468.86

Total Claim - $67,237.05

The carriers insurer, has offered to settle the claim for $47,768.19, but is saying they will not cover the cover the $19,468.86 for “Freight Claim for Critical Panels from Accident”, the airfreight portion we included in the claim.

We had to airfreight replacement panels that were damaged in the accident from our supplier. These panels were for our customer’s orders that were seriously delayed due to the wreck and delay in getting our product released.

My question is do we have any recourse on the airfreight portion of the claim. I know that many carriers will claim special damages because they were not aware of the time constraints that a delay would have caused. The insurer has denied the airfreight stating that is not part of their coverage with the carrier.

Aside from this, my position is that a 52-day delay in getting product back is excessive and the carrier and its insurer were made aware of the significance of releasing the product the day the accident occurred.

Should we settle the claim based on the $47,768.19 or are we entitled for full cost recovery that includes the airfreight portion of the claim?

I know we are getting down to the wire on filing any legal action and we have been trying to negotiate in good faith with the carrier but we are not getting anywhere.

Answer: Your question has been referred to me for a reply. The following are parts of two memos that I recently prepared for clients on the issue of special damages for substitute transportation, and on delays that occur after the initial delivery of the shipment.

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"SPECIAL DAMAGES" -- COST OF ALTERNATE TRANSPORTATION WHEN SHIPMENTS ARE DELAYED - SURVEY OF RELEVANT COURT DECISIONS

West Bros., Inc. v. Resource Management Service, Inc., 283 Ala. 78, 214 So.2d 431 (1968) involved a shipment of seed that was sent from Birmingham to New Orleans for export on a certain ship to Argentina. The plaintiff's employee told the carrier that the shipment had to be in New Orleans by a specific date; the freight bill was marked: "Ship Sails Tuesday Morning, September 14th" and under that notation the word "Rush" appeared nine times. The carrier misplaced the shipment and it was not found until after the ship sailed.

The plaintiff sued for the value of the seed, claiming it was worthless when ultimately located, and for the costs of sending a replacement shipment to New Orleans in a pickup truck. The court awarded the value of the seed (general damages) and the extra transportation costs (special damages).

In *Franklin Mfg. Co. v. Union Pacific R.R. Co.*, 311 Minn. 296, 248 N.W.2d 326 (1976), the plaintiff ordered a shipment of insulation to be used in its manufacturing business. Due to misrouting by the railroad, two weeks passed. The plaintiff located the shipment, had it picked up by truck and delivered to his plant. It sued for the cost of the alternate transportation.

In remanding the case to the trial court, the appeals court rejected the distinction between "special" and "general" damages, in favor of a test of foreseeability. It stated:

> . . . the dispositive issue in the instant case is simply whether at the time of entering the contract defendant-carrier could have reasonably foreseen as likely that plaintiff-purchaser would procure substitute transportation if there was a delay in the delivery of the goods

The court held in favor of the plaintiff and observed:

> . . . if the delay was going to be substantial, it could well be reasonably foreseeable by defendant that plaintiff would feel compelled to procure substitute transportation of goods.

Affiliated Foods, Inc. v. Puerto Rico Marine Management, Inc., 645 F.Supp. 838 (D. Puerto Rico 1986) involved the ocean transportation of approximately 33,000 pounds of assorted fruits and vegetables from Florida to meet a cruise ship at St. Thomas, U.S. Virgin Islands. The reefer container with plaintiff's produce had been mislabeled and had remained at the stop-over point in San Juan while another van was erroneously sent to St. Thomas. When the container failed to arrive to meet the ship the plaintiff shipped a replacement order by air at a cost of $13,500.

The issue was whether the cost of substitute air transportation was recoverable. The court noted that the ocean carrier's agent specifically stated that he could not guaranty delivery at a specific time or place; thus, "the special circumstances that could have established the element of foreseeability were expressly rejected by defendants' agent . . .", and ruled that these damages were special damages and not recoverable.

Florida East Coast Ry. Co. v. Beaver Street Fisheries, 537 So.2d 1065 (Fla.App. 1 Dist. 1989) involved the shipment of two reefer containers of food from Jacksonville, Florida to Club Med at Providenciales, British West Indies. The containers were transported first by rail to Fort Lauderdale and then by barge to Providenciales, where it was discovered that the food had spoiled. Since the resort would be completely out of food for some 600 guests, a replacement

shipment was sent by jet charter. One of the issues was whether the railroad would be liable for the cost of shipping the replacement. The court held that these costs would be "special damages" and not compensable, stating:

> In summary, with regard to the first issue, we consider that a carrier's liability for damages due to loss or injury to a food shipment slated for a facility in the British West Indies should contemplate the inconvenience occasioned by the loss or the attendant delay for a replacement shipment. On the other hand, we do not consider it reasonable that a carrier would foresee circumstances such as those which obtained in this case, i.e., that loss of the food shipment would leave Club Med completely without food for its guests. Rather, a reasonable person could consider that a large resort hotel situated on a Caribbean Island would maintain a reserve food supply, in anticipation of late shipments or an emergency situation such as a hurricane. By the same token, BSF agrees that FEC was without knowledge that Club Med would be completely without food for its guests if the food in containers 336 and 337 did not arrive in good condition. Therefore, we conclude that special damages are not warranted in the circumstances of this case, and reverse on this issue.

In the case of *Burlington Air Express v. Truck Air of Carolinas*, 8 F.Supp.2d 508 (D. S.C. 1998), Burlington, an air freight forwarder, tendered a consolidated shipment of cargo to Truck Air for truck transportation from Greenville, South Carolina to Burlington's Toledo, Ohio terminal.

While the shipment was temporarily lost, Technotrim, a customer of Burlington, chartered an airplane from Greenville, South Carolina to Los Angeles, California, to ship a replacement shipment for their portion of the cargo, and then billed Burlington for $22,114.31 for the charter costs, which Burlington paid "as a gesture of gratitude and as a business decision". Burlington chartered another airplane to deliver a shipment for its customer Milliken & Co. that cost $9,600.00, and also incurred additional charges for special delivery of other customer shipments that were involved.

The court referred to the Beaver Street Fisheries case discussed above and said:

> As in Beaver Street, there is no competent substantial evidence in the instant case to support a finding that the carrier had reason to know or foresee that, in the event the subject shipment was lost or damaged, the shipper would charter an airplane to forward a replacement shipment. Thus, such damages cannot be recovered from Defendant in this matter.

Texas A&M v. Magna Transportation, Inc., 338 F.3d 394 (5th Cir. 2003) involved the shipment of special deep water drilling equipment from Houston, Texas to meet a research vessel in Capetown, South Africa in early April 1998. Texas A&M Research Foundation ("TAMRF") contracted with Magna, which in turn arranged with Navajo Shipping Agency for the ocean transportation by Italia di Navigazione, S.p.A.

The shipment consisted of a flatrack and two containers; only the flatrack reached Capetown and the two containers were misrouted and ultimately ended up in La Speiza, Italy. Due to the delay TAMRF placed the most essential equipment into a single container for air shipment to the island of Reunion; from there TAMRF chartered a small freighter to attempt a mid-sea rendezvous with the research vessel.

TAMRF sued Magna (which impleaded Navajo and Italia) for damages including the cost of the air shipment and the chartered freighter. The district court disallowed these costs as consequential damages because they were unforeseeable and thus unrecoverable. The appellate court reviewed the record and reversed, stating:

> Judging from the findings of facts, Magna had sufficient notice of the special circumstances surrounding the cargo that it can be held liable for special damages resulting from TAMRF's attempts to secure an alternate means of delivering the

> cargo. The court found that "Magna was aware of the time-sensitive nature of the delivery of [the] equipment." In addition, Dana Holcomb, Magna's president, admitted knowing the purpose of the Ocean Drilling Project.
>
> Further, Magna had worked with TAMRF on several time and place sensitive deliveries and was aware that, in this case, TAMRF had arranged alternate shipping dates to ensure timely delivery. Although a general awareness that harm could result from any untimely delivery does not justify an award of consequential damages, Magna had actual notice of the importance to TAMRF of timely delivery. Therefore, the district court clearly erred in holding these expenses to be unforeseeable.

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"SPECIAL DAMAGES" - TIME OF CONTRACTING VS. NOTICE AT A LATER DATE

It is the general rule that damages recoverable for delay in transportation must be such as might reasonably have been contemplated by the parties at the time the contract of carriage was made. *Ill. Cent. Gulf R.R. v. S. Rock, Inc.*, 644 F.2d 1138, 1141 (5th Cir. 1981)); see also *Gardner v. Mid-Continent Grain Co.*, 168 F.2d 819, 822 (8th Cir. 1948). However, as with any rule, there are exceptions. When a breach consists of the failure to make delivery after a shipment has reached its destination, and nothing remains to be done by the carrier except to make delivery, the carrier is responsible for such special damages as it may then be informed will likely result from its negligence.

This exception was explained in *Turner's Farms, Inc. v. Maine Central Railroad Co.*, 486 F.Supp. 694 (D. Me. 1980). In Turner's Farms, on the day before a shipment of feed arrived and on the day of its arrival, the buyer informed the station master of the urgent need for the chicken feed and the likely consequences if it was not delivered before the upcoming holiday weekend (loss of profits on the sale of eggs). The court held that, although special damages were not contemplated at the time the goods were shipped and the bills of lading executed, lost profits were recoverable because of a three-day negligent delay in delivering cars from the destination station to the buyer's siding. The court explained:

> The rationale for the special rule is that after a shipment has reached its destination point the risks of actual shipment are complete, and when notice of special circumstances is given at this point, the carrier is capable of taking the necessary precautions to avoid negligent delay of delivery.

See also *Contempo Metal Furniture Co. v. East Texas Motor Freight Lines, Inc.*, 661 F.2d 761 (9th Cir. 1981). This case involved a shipment of steel tubing from Illinois to Contempo in California. En route, the tubing was damaged by rain, and it arrived in a rusted and pitted condition. Contempo rejected the merchandise. Thereafter, ETMF subjected the steel tubing to a "pickling" process that removed the visual manifestations of the damage. ETMF redelivered the tubing, and Contempo accepted it without inspection or exception. When Contempo chromed the tubing in order to make chairs with it, the pitting reappeared.

The district court awarded Contempo the labor costs incurred in cutting, bending, and chroming the steel tubing before it discovered that the tubing was defective. ETMF argued that those labor costs were special damages not recoverable under the Carmack Amendment, because, under the general rule, notice of the special damages must be given at or before the contract is made. The appellate court first noted that "ETMF is correct that Contempo's labor costs are special damages because they were not reasonably foreseeable to ETMF when it undertook to transport the goods". However, it then referred to exception discussed in the Turner's Farms case, stating:

> Some courts have recognized an exception to the general rule when the carrier receives notice, at the time the shipment reaches its destination, that special circumstances require prompt delivery, and the carrier negligently delays in making the delivery. E.g., *Turner's Farms, Inc. v. Maine Central Railroad Co.*, 486 F.Supp. 694, 699-700 (D.Me.1980). The rationale for this exception is that when the goods reach their destination, the risks of actual shipment are past and the carrier can take the necessary precautions to avoid negligent delay in delivery. Id. at 700. A carrier's undertaking to recondition rejected goods is analogous to a delay in delivery upon reaching their destination.
>
> The goods have arrived and the risks of shipment are past. If notified at this point of special damages that may result from reconditioning, the carrier may choose either not to recondition or to take special precautions in reconditioning. For this reason, we hold that the implied notice received by ETMF upon Contempo's rejection of its first delivery was sufficient to make ETMF liable for Contempo's special damages.

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Based on the foregoing precedent and the specific facts you have described, I think that the carrier would be liable for the cost of the air freight, and that a court would uphold an award of special damages.

400) FREIGHT CLAIMS – SPECIAL DAMAGES FOR DELAY

Question: Our truck picked up the load from the shipper on a Tuesday to be delivered in California on Friday for a show on Monday. The truck broke down, so there was a delay. We notified the customer of the delay and faxed the customer copies of the bills showing that the truck did need to be repaired.

We ran the truck and delivered the freight Sunday morning. A crew got the tent up and the show went off OK on Monday. The customer is now claiming delay to change a plane ticket, hotel accommodations and for wait time because the truck was not there. We also called the customer and told them that the truck was running late because of repairs. The receiver had no problem but it is the shipper who is upset and now will not pay the bill until we agree to their claim. Please advise the legalities

Answer: This claim is for "special damages", see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3.

As a general rule, special damages are not recoverable unless the carrier has actual or constructive notice at the time the shipment is received for transportation as to the specific consequences of a failure to make timely delivery, i.e., that the damages were "foreseeable".

The legal question is whether you knew or should have known that the two-day delay (from Friday to Sunday) would result in these damages -- to change a plane ticket, hotel accommodations and for wait time because the truck was not there, etc.

These cases turn on very specific facts - notice on the bill of lading or shipping documents, communications at the time the shipment is picked up or while in transit, etc.

If you can't work this out with your customer, you might have to bring a suit to collect your freight charges. Then, if the customer files a counterclaim for its special damages, it would have the burden of proving that you had actual or constructive knowledge that these expenses would be incurred.

401) FREIGHT CLAIMS – SPECIAL DAMAGES FOR DELAY

Question: I was curious about claims for delay against LTL carriers (not under contract).

#1.) Can we request (and do you think they might listen?) that LTL carriers, not under contract, customize rules tariffs that specifically spell out “due dispatch” or “unreasonable delay?”

We had an LTL carrier misplace a pallet of printed, time-dated material for 5 days after the scheduled delivery date. On the third day, after the carrier informed us that they had yet to find the missing product, our print customer requested that we go back to press. We re-printed, expedited and delivered the product within the next 48 hours. On the afternoon of the day we delivered the reprint shipment, the LTL carrier found the missing pallet. We had the carrier return the pallet to our plant and then filed a claim. The carrier refused the claim based on the fact that they don’t not pay delay claims. Are they just in doing so? As info: The carrier offers us a discount and a class reduction.

#2.) By sending a separate document that details the delivery times and dates (that notes “all times and dates must be strictly adhered to”) in conjunction with the bill of lading, do we cover or protect ourselves (in instances of delay - special damages) as is indicated under the verbiage of CJS, Vol. 13, 299?

Answer: Common carriers are liable for delay - just as they are liable for loss or damage to goods, *New York, P. & N.R. Co. v. Peninsula Produce Exch.*, 240 U.S. 34, 38-9 (1916).

As you have observed, the issue is usually whether the damages are “general” or “special” damages, and, if so, whether they are recoverable. This is discussed in great detail in *Freight Claims in Plain English* (3rd ed. 1995) at Section 7.3, et. seq.

The key is whether the damages are “foreseeable” at the time the contract of carriage is entered into, and the court decisions use the terminology “actual or constructive notice”.

Thus, if the carrier is given specific delivery instructions, told what economic damages may result if the shipment is delayed, and accepts the shipment under those circumstances, you should be able to recover for delay.

402) FREIGHT CLAIMS – SPECIAL DAMAGES ON LOST SHIPMENT

Question: My company manufacturers portable generators. We shipped a generator from WI to MO on December 3rd, freight prepaid, FOB destination. The carrier lost the shipment. We filed a freight claim in January and were paid in March. The consignee lost the sale because the generator needed to be installed before a specific date. The consignee filed a claim with the carrier for his lost mark up and labor. The carrier has denied based on special damages were not noted on the bill of lading. Does the consignee have an argument?

Answer: Since the shipment was “FOB destination”, the presumption is that you (the seller) had risk of loss in transit and should be the proper party to file the claim. Apparently, you did this and the carrier paid the claim, and can properly consider the matter concluded.

Even if the buyer/consignee had risk of loss and had filed the claim, it is unlikely that it could have recovered any more than the invoice amount it actually paid for the goods. The only exception which comes to mind is if the consignee had gone out and purchased a replacement unit (in order to meet its customer’s requirement) and the replacement cost more than the original unit which was lost.

The carrier is correct in stating that “special damages” are not usually recoverable unless there is notice at the time of shipment; see “*Freight Claims in Plain English*” (3rd Ed. 1995) at Section 7.3. In other words, unless the consignee’s potential loss of sale was clearly communicated to the carrier at the time of shipment, it would not be liable.

403) FREIGHT CLAIMS – SPECIAL DAMAGES

Question: Our corporation tendered a shipment to a less-than-truckload (LTL) carrier. The shipment was involved in an accident and was destroyed. We filed our claim and the LTL carrier settled for $1.00 per pound based on our FAK class 50 discount. The rules tariff dictates compensation up front and it is understood however, we had to re-produce the product and ship via airfreight in order to meet our customer's needs.

We filed for the airfreight charges as part of our claim and the carrier refused to pay them stating that the airfreight charges were "special and consequential damages".

I know that the airfreight charges are "special damages" however, we print the specific delivery appoint time and day on the bill of lading (B/L). In conjunction with the B/L we also follow up with a "load rate agreement" that contains the verbiage of 49 USC §14101(b) and 49 USC §14706. This document also "backs up" the BOL and details the delivery times, dates and requirements as well.

I have some questions:

1) Are the air freight charges recoverable (Do the documents that I sent to the LTL carrier meet the requirements detailed in Volume 13 of Corpus Juris Secundum, section 229?) or are the air freight charges recoverable under "incidental damages" as detailed under Volume 13 Corpus Juris Secundum page 617? or am I out of luck?

2) Would my "Load rate agreement" void or supercede the LTL carrier's rules tariff. The Load rate agreement stipulates that "By signing or transporting this load, the carrier agrees to all of the terms, conditions and parts of this document."

Answer: Your question actually raises a number of issues.

First, you refer to a "load rate agreement" (which you have not furnished). A properly drawn transportation agreement would usually address some of these issues (liability limitation, cost of shipping a substitute or replacement shipment, etc.) and that would be the first place to start.

Second, the freight charges for shipping a substitute shipment to a customer is normally not a compensable element of damages, see "Freight Claims in Plain English" (3rd ed. 1995) at Section 7.4.9.

Third, if you have an enforceable liability limitation - either in your contract or in the carrier's bill of lading and/or tariff - that would be the maximum or "cap" on the amount you can recover.

404) FREIGHT CLAIMS – STINKY TRAILER

Question: A carrier provided a trailer to haul our load that had a problem. Everyone that entered the trailer to load the shipment detected a peculiar odor, which smelled to us like a chemical. Almost immediately every one that entered the trailer started coughing, and sneezing. One coughed so much she threw up. We asked the truck driver to find out from their dispatch what had been hauled on the trailer prior to bringing it here. The driver was told that only plastic had been on the truck before it was brought here.

Answer: It is possible that the strong odor referred to could be from some toxic or noxious chemical substance and that it might penetrate the packaging and be absorbed by the merchandise, making it unsaleable.

While this scenario is unlikely, it probably would be advisable to notify the carrier and request a joint inspection of the merchandise. That way, if there is any problem, an appropriate claim can be filed.

405) FREIGHT CLAIMS – TERMS OF SALE AND TITLE

Question: If a shipment is shipping point "Collect" and the load arrives with partially damaged material, and the consignee/buyer refuses the entire load, who retains ownership of the load? (shipper/consignee/carrier?)

NOTE: The Bill of Lading ("B/L") states that all damages must be returned to the shipper. This is printed on the B/L but is not necessarily the instructions of the buyer. Would this note have any significance?

Answer: 1. 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.

It should be noted that freight payment terms such as "Prepaid" or "Collect" only determine primary responsibility for the payment of freight charges and do not govern the risk of loss as between buyer and seller.

2. Even though the goods may have been rejected to the carrier, this does not affect the ownership. The carrier does not own the goods (unless it has paid a claim and been given the right to salvage the goods).

406) FREIGHT CLAIMS – TERMS OF SALE

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

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

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

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

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

Answer: Let me try to answer your questions.

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

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

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

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

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

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

407) FREIGHT CLAIMS - TIME ALLOWED FOR INSPECTION

Question: How long must a consignee hold onto damaged merchandise when waiting for the carrier to perform an inspection? We reported concealed damage to the carrier within 24 hours of cargo delivery, and we are now accruing storage charges for this damaged merchandise.

Answer: There is no "official" standard or rule on this.

I would suggest that you (1) notify the carrier in writing that you are going to hold the damaged freight for their inspection for 15 days and will then proceed to scrap or salvage it and (2) thoroughly document the damage with a detailed inspection report, photos, etc.

If it is a large claim, I would caution you not to destroy the evidence without giving the carrier ample opportunity to inspect the damage (and the packaging, if that would be relevant). This could be considered "spoliation of evidence" and would be a problem if you have to litigate the claim.

408) FREIGHT CLAIMS – TIME FOR CARRIER TO PICK UP DAMAGED GOODS

Question: I recently assumed a position responsible for returns among other areas. While walking through the returns racking I noticed a pallet with some markings that noted a freight claim had been filed over one year ago. I checked the carrier website and found the claim had been paid 10 months ago. How long does the carrier have to claim the goods for salvage before I can dispose of them?

Answer: I don't think there is any specific time limit - certainly there is no applicable federal statute or regulation.

My suggestion would be to write to the carrier and explain the situation. Tell them that if they want to pick up the goods for salvage they must do it by a specific date (give them at least 15 days) and that if they do not pick it up, you will dispose of the goods.

409) FREIGHT CLAIMS – TIME LIMITS

Question: What is the time limit for submitting a freight claim for damaged goods shipped to you? One year? Nine months? I need the time limit please.

Answer: I am assuming that this is an interstate shipment by truck. Most less-than-truckload motor carriers use some form of the Uniform Straight Bill of Lading as set forth in the National Motor Freight Classification. There are basically two versions - a "short form" and a "long form". The short form refers to and incorporates the terms and conditions that are on the reverse side of the "long form".

The Uniform Straight Bill of Lading provides:

> Sec. 3. (a) As a condition precedent to recovery, claims must be filed in writing with any participating carrier having sufficient information to identify the shipment.
>
> (b) Claims for loss or damage must be filed within nine months after the delivery of the property (or, in the case of export traffic, within nine months after delivery at the port of export), except that claims for failure to make delivery must be filed within nine months after a reasonable time for delivery has elapsed.
>
> (c) Suits for loss, damage, injury or delay shall be instituted against any carrier no later than two years and one day from the day when written notice is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts of the claim specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier shall be liable, and such claims will not be paid.

The simple answer to your question is "probably nine months". However, you must look at the actual bill of lading that was used, because there are many variations and some do not contain this provision or do not effectively incorporate the time limit by reference to the long form bill of lading or to the carrier's tariff.

410) FREIGHT CLAIMS – TIME LIMITS

Question: I have a customer who shipped a load on February 6, 2006 and it delivered February 7, 2006. There were 56 cases rejected back to the driver because it was the wrong product. The customer contacted us in August to see where the product was because they said it was never returned. In October when we could still not locate the product and approaching the 9 month cut off the customer sent a E-mail advising that she was going to file a claim that week (October 25, 2006) but we didn't get the claim until December 20, 2006 more then 10 months after delivery.

What is the time limit once the customer says they are going to file a claim compared to 9 months from date of delivery? Can we still stand by the 9 months to dispute the claim?

Answer: The 9-month time limit that you refer to is a contractual time limit that is usually found in the terms and conditions on the reverse side of the Uniform Straight Bill of Lading or incorporated by reference in a short form version of the bill of lading. The time limit runs from the date of delivery (unless there is a non-delivery, in which case the time limit runs from a reasonable time for delivery). Assuming that this is your situation, then the failure to file a claim in writing within the 9 months is "fatal" and the carrier does not have to pay the claim.

411) FREIGHT CLAIMS – TIME LIMITS

Question: A shipment was picked up on 03/13/06. The customer contacted our company in late March of 2007 stating she was missing her crate. Our warehouse did a preliminary search to try and find her crate but after a few weeks informed the customer that they couldn't find her crate. The warehouse contacted the claims department. to see what we could do for her. Since the shipment was going to a destination outside of the state it originated the reasonable time expected for arrival was extended which would have put the nine months and 1 day for claim filing to late December of 2006. Her argument is that it isn't her fault she didn't know about the time limits and would like full reimbursement for her missing crate. Is it reasonable to assume a customer can come back 13 months later to file a claim on missing freight and expect a carrier to honor that?

Answer: I will assume that this was a motor carrier shipment and moved under a Uniform Straight Bill of Lading, or some other form of bill of lading that incorporates a 9-month tariff provision for the filing of a claim for loss or damage.

If so, the failure of the claimant to file within the contractual time limit would mean that the claim is time-barred and the carrier has no legal obligation to pay the claim. I would note that in the case of a non-delivery, the time limit is 9 months plus a "reasonable" time for delivery.

This does not mean that a carrier can't waive the time limit if it chooses - for good customer relations, etc.

The subject of time limits is extensively covered in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 9.0

412) FREIGHT CLAIMS – TIME LIMITS FOR FILING IN CANADA

Question: What are the filing time requirements for freight claims in Canada? And how, if any, do the filing requirements differ from the U.S.?

Some of the research we have found states "notice" must be given to the carrier within 60 days of delivery for damage claims and 9 months for lost shipments.

The question is what is "notice"? Must this notice be the official freight claim or is it a simple notification of damages. If it is merely notification of damage, what must this notification include?

Any information or resource tools you can provide would be greatly beneficial and appreciated.

Answer: In Canada a uniform motor carrier bill of lading has been adopted by all provinces, which contains provisions governing a notice of claim:

> Notice of Claim
>
> i. No carrier is liable for loss, damage, or delay to any goods carried under the bill of lading unless notice thereof setting out particulars of the origin, destination and date of shipment of the goods and the estimated amount claimed in respect of such loss, damage or delay is given in writing to the originating carrier or the delivering carrier within sixty days after delivery of the goods or, in the case of failure to make delivery, within nine months from the date of shipment.
> ii. The final statement of claim must be filed within nine months from the date of shipment, together with a copy of the paid freight bill.

It is my understanding that the notice must include the particulars in sub-paragraph (i.) above, and that Canadian courts would probably require strict compliance, see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 19.6.

413) FREIGHT CLAIMS – TIME LIMITS

Question: Under Carmack in 49 U.S.C 14706(e) (Minimum Period for Filing Claims), kindly consider the following queries:

(1) Assume that a shipper does NOT file a freight claim with the carrier within the 9-month time limit, does this generally bar any recovery on his part? If the shipper does NOT file a freight claim within the 9-month time limit, is he thus barred from the filing of a civil action against the carrier?

(2) Must a timely filed freight claim (within 9-months) preclude the filing of a civil action under the 2-year limitation?

(3) Is a shipper free to pursue a civil action against the carrier instead of submitting a written claim to the carrier? If so, what is his time limit?

Answer: First, it should be understood that the time limits for filing a claim and bringing a suit in 49 U.S.C. 14706 (the "Carmack Amendment") are minimum time limits and NOT a statute of limitations.

These time limits are said to be "contractual" in that they are governed by the contract of carriage, usually the terms and conditions found on the reverse side of the Uniform Straight Bill of Lading, which provides:

> Sec. 3. (a) As a condition precedent to recovery, claims must be filed in writing with: any participating carrier having sufficient information to identify the shipment.
>
> (b) Claims for loss or damage must be filed within nine months after the delivery of the property (or, in the case of export traffic, within nine months after delivery at the port of export), except that claims for failure to make delivery must be filed within nine months after a reasonable time for delivery has elapsed.

(c) Suits for loss, damage, injury or delay shall be instituted against any carrier no later than two years and one day from the day when written notice is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts of the claim specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier shall be liable, and such claims will not be paid.

Thus, the first question to be asked is: what form of bill of lading (or other contractual document) was used, and what does it say?

Unless there is some applicable contractual language such as that quoted above, then the courts would probably say that claims must be filed within a "reasonable" time, and suits brought within the applicable state-law statute of limitations for a contract action (6 years in most states).

414) FREIGHT CLAIMS – TIME LIMITS

Question: We are a carrier and have an issue with a customer charging us back for freight claims. We carry furniture for a large manufacturer and recently this company has billed us for several thousand dollars in freight claims as old as nine months. Neither the consignee nor the manufacturer has ever filed a claim, called for an inspection by us or followed any other guidelines that I believe are required. The only steps that were taken involved the manufacturers sales representative selling the furniture to a salvage company many months ago and now billing us the difference between the salvage recovery and the cost of the furniture. Is this legal without my company ever even knowing there had been a claim?

Answer: Under the Carmack Amendment (49 U.S.C. 14706) a carrier cannot provide in its bill of lading, tariff or any other form of contract for a shorter period than 9 months for the filing of a claim for loss or damage, i.e., this is a minimum period.

While it is always advisable for a claimant to notify the carrier immediately upon discovery of loss or damage, and to file a claim promptly, the claimant does have at least 9 months to file a formal written claim.

If your contract of carriage (bill of lading) specifies that claims must be filed within 9 months and the shipper has failed to file a written claim within that time period, then you can lawfully decline the claim and they have no basis to charge you back.

I would point out that the federal regulations at 49 CFR Part 370 specify the guidelines as to what constitutes a valid claim, and also establish time lines for the carrier to reply and/or respond to claims.

415) FREIGHT CLAIMS – TIME TO FILE ON DROPPED TRAILER

Question: I have received a declination from a carrier based on an agreement they have with our customer. The agreement states that when they drop a trailer the consignee has 24 hours to advise of any exceptions. If this does not occur within the specified time frame the carrier is not liable.

Is this a valid declination? My assumption is that the carrier's liability is to us, the shipper. Any arrangements they made with the consignee does not effect their obligation to us, which is to deliver the goods in full without exception. Their contract is with us, and the shipments are prepaid.

Answer: 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.

This language makes it clear that the notice provision of the consignee's drop trailer agreement is unenforceable and cannot preclude you from filing a claim, so long as it is done within the nine-month period.

416) FREIGHT CLAIMS - TIME TO FILE

Question: Six months after delivery a customer of ours filed a claim for shortages. The shortages were not noted at time of delivery and in fact the bill of lading ("B/L") was signed by the consignee; "Subject to Count".

Our position was that this was not a proper way to sign the B/L and because of the length of time elapsed after delivery we were declining. They are not accepting this and say that because this was a shipper load and count sealed load and there was not seal integrity on the shipment, that in itself is the larger problem.

I'm saying that without the seal issue, this was not the proper way to sign the B/L and hold the carrier responsible for specific loss.

Answer: It is always a best practice to report loss or damage promptly upon delivery so that the carrier can investigate the claim and make a proper determination as to liability.

However, even if this is not done, you must recognize that a shipper has the legal right to file a claim at any time up to nine (9) months from the date of delivery. This minimum time period is set forth in federal law, the "Carmack Amendment", 49 U.S.C. 14706, which provides in relevant part:

> (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....

Thus, you can't legally decline the shipper's claim just because it was filed six months after the shipment was delivered.

417) FREIGHT CLAIMS – TIME TO PROVIDE NECESSARY INFORMATION

Question: We received a claim which is missing some documentation. We sent a letter requesting that the info be provided within 10 days from the date of the letter. After the 10 days, if the info is not received, we send a formal declination letter stating the claim is declined for a lack of information.

Three months later, we receive the information. We send a declination letter stating the claim must remain declined as we did not receive this information in a timely manner.

How long would the claimant legally have to supply the missing information? Can they supply this months or years later?

Is there any case law to support a declination based on information not received timely by the carrier?

Or, as long as the claimant sends in the requested information within 2 years and a day from the formal declination date, is the carrier required to go back and reopen and pay the claim, if liable?

Answer: First, you should be aware that carriers' claim practices are governed by federal regulations of the Federal Motor Carrier Safety Administration ("FMCSA") (formerly the Interstate Commerce Commission) that are found at 49 CFR Part 370. I suggest that you read and become familiar with them.

As to time limits, the Uniform Straight Bill of Lading contains two contractual time limits. Simply stated, claims must be filed in writing within 9 months of delivery, and suits must be brought within 2 years from the date that the carrier declines the claim. This reflects the minimum time period that is prescribed by federal law, the "Carmack Amendment", 49 USC § 14706.

The regulations provide that a claim must be in writing: "(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..."

So long as these minimum claim requirements are met within the nine month period, a claimant can supplement its claim with any additional information that may be needed. The carrier has a duty to consider such information, to investigate the claim, and to make a good faith effort to resolve the claim. Of course, once more than 2 years have passed from the declination of the claim, the shipper would then be time-barred from commencing a court action for recovery.

418) FREIGHT CLAIMS – TRAILER CONTAMINATION

Question: We recently received a claim on a load of onions that was refused at the consignee because of "blood in trailer". As per our normal procedure we sent the load to a local produce broker to be inspected and resold, and it was sold at a discount. There was not anything that actually contaminated the product as they were in bins and tubs and never came in contact with the floor of the trailer. I questioned the shipper and received a report from them stating the trailer was clean and free of odors at the time of loading.

Would this be a case of concealed damage since the trailer passed both shipper and driver visual inspections at time of loading? If the damages are concealed, is the carrier responsible for them if they could not reasonably foresee them and took all reasonable precautions to avoid them (i.e.: washed trailer before loading). Since neither the receiver nor the shipper made any attempt to mitigate the losses, can the shipper file a valid claim? Who receives the proceeds from the resale?

Answer: Your question raises a number of issues, which I will attempt to address.

I will assume that the blood on the floor of the trailer was there when the shipment of onions was loaded and was not observed by either the driver or by the shipper.

1. 49 U.S.C. 14101 (part of the Interstate Commerce Act) provides that "...a motor carrier shall provide safe and adequate service, equipment, and facilities". This imposes a statutory duty on the motor carrier to use reasonable care in providing adequate equipment, including trailers that are clean and suitable for the commodities being transported. It would be a question of fact as to whether the carrier used the appropriate level of care to inspect the trailer, knowing that it was intended to carry food (onions).

2. 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. Although you say that there was no apparent contamination, it is well known that animal or human blood can carry diseases.

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".

3. From the circumstances you have described, a claim can be filed against the carrier. Obviously, with this type of claim, there are a number of factual issues and it is likely that the carrier might refuse to pay the claim and argue that the rejection of the shipment was unreasonable.

4. Unless the owner of the goods has authorized the carrier to keep the damaged goods and to salvage them, the owner of the goods is entitled to the salvage proceeds. If the owner salvages damaged goods, it must give a credit on its claim against the carrier for the net salvage proceeds. It may be noted that the reasonable expenses of inspection, sampling, testing, etc. may be deducted from the sale to arrive at the net salvage proceeds.

5. This is not a case of "concealed damage". Concealed damage refers to damage to the goods that can not be ascertained at the time of delivery, and which is only discovered after delivery, e.g., when the package or crate is opened.

419) FREIGHT CLAIMS - VENDOR AGREES TO EXCEPTION RATING

Question: We have a vendor with terms "FOB Origin - Freight Allowed". We have an issue with their carrier losing the shipment and per our terms, we filed the claim with our vendor's carrier. The carrier paid the claim based on an exception rating agreement they signed with the vendor, thereby lowering the claim payment considerably.

The vendor insists they are reimbursed in full per their FOB terms, however, I believe the vendor is responsible for the difference due to their carrier contract.

Answer: There are two separate contractual relationships here: a shipper-carrier contract and a vendor-purchaser contract.

The "contract of carriage" is between the shipper and carrier, whether it is through a bill of lading that incorporates the carrier's tariff, or through a formal transportation agreement. As a general rule, if that contract has a valid and enforceable liability limitation it would be binding on both the shipper and the consignee.

The "contract of sale" is between the vendor and the purchaser of the goods. You have indicated that the terms of sale were "FOB Origin" which, under the Uniform Commercial Code, establishes a presumption that the purchaser assumes risk of loss in transit, unless the parties have otherwise agreed.

Unless your purchase order or contract with your vendor specifies that it should not ship goods to you under a "released rate" or some other carrier liability limitation, the vendor would probably be free to ship in whatever manner is usual and customary for the trade.

Obviously, properly drafted purchase orders, transportation agreements, etc. are the way to avoid the kind of problem that you have described.

420) FREIGHT CLAIMS – VERIFICATION OF LOSS

Question: I have a question for you that is a major issue in our industry. It deals with the following:

Federal Motor Carrier Safety Administration ("FMCSA") Regulations Part 370 - PRINCIPLES AND PRACTICES FOR THE INVESTIGATION AND VOLUNTARY DISPOSITION OF LOSS AND DAMAGE CLAIMS AND PROCESSING SALVAGE

Particularly, 370.7 (c) Verification of loss. When an asserted claim for loss of an entire package or an entire shipment cannot be otherwise authenticated upon investigation, the carrier shall obtain from the consignee of the shipment involved a certified statement in writing that the property for which the claim is filed has not been received from any other source. http://www.fmcsa.dot.gov/rulesregs/fmcsr/regs/370.htm

Problem:

Carrier picks up from ABC Company a shipment of tools. The shipment is transported through the carrier's system without exception and loaded onto a trailer being dropped at the consignee's distribution center. This is a requirement of the consignee. The carrier's freight bill is returned stamped 30 pieces short, out of a total of 100 pieces. The consignee then issues a notice of deduction from the vendor for $10,000. Upon receipt of this pending deduction, the Vendor gets a copy of the carrier's delivery receipt and files a claim for $10,000.

Past experience has determined the Vendor, shipping prepaid, normally ships more than one Purchase Order per shipment. In this case, two Purchase Orders were shipped on the same Bill of Lading, one for 70 cartons and one for 30 cartons. When the Distribution Center receives freight, they receive by Purchase Order number. It does not matter that the carrier's freight bill calls for two Purchase Order numbers, when the receiver reviews his Purchase Order against the Carrier's freight bill, the receiver checks in 70 cartons but since he did not receive 100 cartons, he writes up the carrier's freight bill as 30 short.

The carrier cannot find any clearing and turns to both the consignee and shipper for assistance in having an Affidavit of Non Receipt obtained indicating the freight was indeed short and that the consignee has not paid the vendor for the purchase order complete. You see, we have had several incidents with this same vendor and consignee of where the consignee did verify receipt of the complete Purchase Order numbers and paid the Vendor even though the Vendor had already filed a claim and had those claims paid by the carrier. The three claim amounts were $13,000, $22.000 and $11,000 so you can see we appear to be justified in asking for this additional information.

There does not appear to be a good way for the Vendor to notify their claims people when Purchase Order numbers are paid complete when a claim has been filed. We issue an Affidavit of Non Receipt to the consignee who refuses to accept them, check them out and return them to the carrier. The Vendor refuses to furnish to the carrier proof that the Purchase Order was short paid.

Section 370.7 (c) does not give the carrier the right to decline the claim if both parties refuse. We have gone to the Vendor and have attempted to come to an agreement to furnish this information on those claims over $5,000.00 but they will not agree to do so and claim we cannot decline the claim for this reason. Do you have any suggestions on how the carrier can proceed other than to decline the claim until such proof of non or short payment has been supplied regarding a particular claim? Can we legally decline the claim if both parties refuse to furnish the requested information?

Answer: I'm not sure that I really understand the sequence of events in your example, but it appears that there are situations where there is a false indication in the paperwork of a shortage at the time of delivery that is communicated by the consignee to the shipper, and which triggers a claim by the shipper. Then, it is later determined that the goods were delivered and the consignee pays the shipper for the goods. However, the shipper fails to withdraw its claim.

Getting back to basics, the claimant's burden of proof is to show that it tendered the goods to the carrier at origin and that there was a shortage at the time of delivery. This is simply a factual question.

I think you are entitled to ask the shipper-claimant for a statement from the consignee verifying that there was indeed an actual shortage at the time of delivery.

Note: Whether the consignee pays the shipper is not necessarily determinative since it is a function of the terms of sale (FOB Origin, etc.) as to which party, seller or buyer, has the risk of loss in transit.

421) FREIGHT CLAIMS - WHAT HAPPENS WHEN CARRIER IS BOUGHT OUT?

Question: When a carrier is bought out by another carrier, is the usual practice for the buying carrier to assume liability for cargo claims on shipments made prior to the buyout? How do we find this out? If not, is the BMC32 our best recourse?

Answer: There really is no "usual practice". It all depends on the type of acquisition (stock purchase, asset purchase, etc.) and the contractual agreements between seller and buyer.

If the selling entity no longer exists, you can try to file with the purchasing entity and see what happens. If the purchasing entity says it has no liability, your only remedy may be to file with the BMC-32 insurer.

422) FREIGHT CLAIMS – WHAT TO DO WITH THE DAMAGED GOODS

Question: After receiving a payment from the trucking company for the full amount that the claim was filed for, can I dispose the damaged goods? Or do I still have to hold on to them? After payment, do I have to ask them each time if I can dispose of damaged goods?

Answer: The real question is whether the goods are "substantially worthless" or whether there is any salvage value. If the goods are not substantially worthless, the law implies a duty to mitigate the loss. What this usually means is that either the shipper or the carrier should try to repair, refurbish or salvage the damaged goods, and that any net salvage value that is recovered should be applied to the claim.

If the carrier has paid a claim for the full value of the goods (usually the invoice price), but the goods still have some value, the carrier may be entitled to take the goods for salvage. If this is the case, I would suggest that you notify the carrier (in writing) that the goods will be available for pick up for a specified period of time (say 30 days), and that if the carrier does not pick up the goods, they will be disposed of or destroyed. Naturally, if there is no potential salvage value, the goods can be disposed of without further notice to the carrier.

423) FREIGHT CLAIMS – WHICH CARRIER IS LIABLE?

Question: A loss and damage claim was filed with the originating carrier. The delivering carrier lost part of the shipment and is procrastinating in paying the claim. The origin carrier won't pay the shipper until the delivering carrier pays them.

Can the originating carrier deny paying the claim based on this scenario?

Answer: The originating carrier that issued the bill of lading is legally responsible even if the loss occurred on the lines of a connecting carrier. This is a basic principle as reflected in the Carmack Amendment, 49 U.S.C. §14706 and the many court decisions interpreting that statute. The originating carrier does have a cause of action for indemnification from the carrier that caused the loss, but that is not your problem.

424) FREIGHT CLAIMS – WHO FILES

Question: Who has the responsibility of filing a claim for damages? Does it depend on the terms of sale, or the terms of freight charges indicated on the bill of lading?

Could you please shed some light on this or point me in the right direction for the answer. Can this be found in CFR 49?

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. 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.

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.

Freight payment terms such as "Prepaid" or "Collect" only determine primary responsibility for the payment of freight charges and do not govern the risk of loss as between buyer and seller.

425) FREIGHT CLAIMS – WHO IS LIABLE?

Question: We hired a "rigging company" to load and secure (on a flatbed) a printing press for transit. Two chains snapped in transit causing the rig to roll and the press to be destroyed. No apparent defect in loading was noted on the bill of lading ("B/L"), however, after the fact the carrier informed us that their driver did think that the machine was loaded in "top heavy" fashion and that he explained this to the rigging company at the time of pick-up. No subsequent measures were taken by either party and the carrier chose to haul the shipment as it was loaded.

Our insurance company filed a claim on behalf of our corporation for $1,000,000. The carrier paid a claim for $100,000 in accordance with their cargo liability policy. Our insurance company took the hit for $900,000. Our insurance company now wishes to subrogate and seek restitution for the $900,000 from the rigging company.

We had no contract with the rigging company. We ordered a crane and rigging service, the service showed up and loaded and secured a piece of machinery onto a flatbed, when they were done, they submitted a bill for their services, we paid the bill.

We also had no contract with the motor carrier. The shipment moved under the Uniform Straight B/L.

Is the carrier liable as in *Association of Maryland Pilots v. Baltimore & Ohio R.R. Co.*, 304 F.Supp. 548, 553 (D. Md. 1969)?

Does the rigging company have any liability in this instance or did they act as an agent of our company?

The B/L was signed/executed by an employee of our company (not the rigging co.).

Answer: From your description of the facts, it would appear that BOTH the rigging company and the motor carrier could be liable for the damage.

If the rigging company was in some way negligent in the manner that it loaded and secured the press, and that negligence caused or contributed to the damage, there would be liability.

Likewise, since the carrier has an obligation to ensure that the cargo is properly and safely loaded, and to examine the vehicle's cargo and loading devices during the course of transportation, the carrier could also be liable, see *Freight Claims in Plain English* (3rd Ed. 1995), and the DOT safety regulations at 49 CFR 392.9 and 393.100.

The only question that I have is whether the claim against the carrier may have been settled, and the carrier discharged from further liability, by accepting the $100,000 payment from its insurance company.

426) FREIGHT CLAIMS – WHO SIGNS PROOF OF DELIVERY?

Question: My current employer recently delivered a shipment (we believe) for which a signed delivery receipt was obtained. This is a repeating type move, which has occurred almost daily for almost two years. The consignee claims this particular shipment was never received. After furnishing them with a "Proof of Delivery" ("P.O.D."), the consignee claims the signature is a forgery. All internal records indicate there was nothing unusual about it (it was checked by different employees at different cities along its route). The P.O.D. includes a time of delivery (12:15 pm.). The merchandise is job specific; hence, no "street value". The claim was denied, and the shipper accepted the declination without litigation. My employer is still handling this move almost daily.

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

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

I would appreciate your opinion on this subject.

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

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

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

427) FREIGHT CLAIMS – WRONG CONSIGNEE GETS DAMAGED WRONG GOODS

Question: Looking for some guidance about claims. We recently made a LTL shipment, the class was 70 and the item weighed around 200 lbs. The problem that has arisen is the item that was supposed to have loaded for shipment was not loaded and an item that was not scheduled to load on the truck was loaded.

Well, the item that was loaded went to the wrong consignee and to compound the matter we learned after the item in route back to our location that the item had been damaged when received at the incorrect consignee. One of the problems that has surfaced is the fact that the carrier who transported the original shipment limits are $6,500 on used equipment.

Another issue is trying to establish which party is at fault for the damage, because the item was moved since the original damage was noticed. Can you tell me if there might be any merit in trying to make a claim against the original carrier, even though the wrong item was shipped? The value for replacing the item is over $ 20,000, which creates a problem with the shipper/carrier liability issue due to the fact that the carrier would not have had any knowledge of the value. How should this be handled?

Answer: This is an unusual fact pattern, but I will try to give you an answer.

First, I don't think it makes any difference whether the "wrong" item was shipped to the "wrong" consignee.

You mention that the item was "moved" and it is not clear whether the damage was observed and noted at the time of delivery, or at some later time. Assuming that the initial outbound shipment was damaged in transit while in the care, custody and control of the carrier - and not after it had been delivered - the carrier would be liable for the damage.

You indicate, however, that there may be a liability limitation for "used equipment". While it is common for motor carriers to have such liability limitations, without seeing the shipping documents and the carrier's tariff, I can't tell you whether such a limitation would be enforceable.

428) FREIGHT CONTRACTS - BROKERING OF LOADS\

Question: I have 2 clauses in a contract I am reading and I need to know what exactly they mean in plain English. Could you please help?

Performance of services: Carrier agrees to meet the distinct needs of_____ and its customers by providing as a CONTRACT MOTOR CARRIER, the transportation and related services set forth in this agreement and each transportation schedule. Carrier shall transport all of customers freight with reasonable dispatch and without delay caused by anything within carriers reasonable control and all occurrences which would be probable or certain to cause delay shall be immediately communicated to ___ and at ___ request affected consignors and consignees.

Successors and Assigns: This agreement and each transportation schedule shall be binding upon carrier and carrier's successors and assigns.. Carrier SHALL NOT sign this agreement or any transportation schedule WITHOUT the prior written consent of _____. Any assignment of this agreement or any transportation schedule, in whole or by part, by Carrier WITHOUT the prior written consent of _____ shall be VOID and of no effect.

My questions are 1) Does the CONTRACT motor carrier have the authority to re broker the load out, or should it be their equipment or one of their drivers or owner operators leased to them? and 2) What statute would it be that states a contract carrier has NO authority to broker loads?

Answer: First, since the ICC Termination Act of 1995, there is no longer any statutory distinction between "common" and "contract" carriage, there are only "motor carriers". Any motor carrier can enter into a transportation contract pursuant to 49 USC §14101.

A motor carrier is required to issue a bill of lading when it receives goods for transportation and becomes responsible for the goods from the time they are received until they are delivered.

An authorized motor carrier can subcontract some or all of the transportation to other carriers, and it can lease equipment and drivers (owner-operators), but the motor carrier remains responsible for the goods under the contract of carriage (bill of lading).

A motor carrier cannot "broker" a shipment to another motor carrier unless it also has a broker's license.

429) FREIGHT FORWARDERS - LIABILITY

Question: This one is a little tricky, but here goes...

We are a freight forwarder and a pick up service for a company located in Hawaii. They have association members who use them (they are also a freight company) to ship freight from various vendors. Due to the fact that they are in Hawaii they have a few different companies that do pick-ups for them, us being one of them.

The shipper in this case called us for a pick-up (we normally pick up freight and take it to the Hawaiian companies' consolidation warehouse via owner operators). We scheduled the pick up and dispatched an owner operator to pick up the freight. The owner operator picked up the freight and failed to deliver it to the consolidation warehouse, and was subsequently arrested for theft in regards to this pick up (his trial is still pending).

The consignee (who is the association member) filed a claim with the Hawaiian company, and they filed a claim with us, and in turn we filed a claim with the owner operator. I informed the Hawaiian company (who filed the claim through us on behalf of their association member) that I received the claim and that it would be investigated, and sent follow-up emails keeping them updated with the status of their claim. At the end of 120 days I informed them that we would need some more time to finish our investigation and that I would contact them once I had more info.

The Hawaiian company failed to inform the consignee (their claimant) of anything during this period. They ended up telling the consignee that we need to be contacted with any questions regarding their claim. The consignee is getting heat from the shipper for payment for the goods, and has now hired an attorney. The attorney has told us that we have until April 27, 2006 to pay the claim.

Now I am still within my 60 day, after the initial 120 days for this claim. My thought on this was that the Hawaiian company was responsible to pay the consignee (due to the fact that they received his claim), and that we are responsible for paying the Hawaiian company (since they filed a claim with us), and that the owner operator is responsible for paying us (since we filed a claim with them). Is this wrong, please let me know the correct way of handling this situation? Also, is legal action allowed at this point since we have not closed the claim (one way or another)?

Answer: Although it is not clear from your description of the facts, I will assume that the shipper was probably a shipper's association and that you issued a freight forwarder's bill of lading to the shipper's association for the shipment.

A freight forwarder is treated the same as a motor carrier when it comes to liability for loss or damage under the "Carmack Amendment", 49 U.S.C. § 14706. Thus, you would primarily liable for the actual loss, unless you have an enforceable limitation of liability under the contract of carriage (usually set forth in your bill of lading or tariff). Either the shipper or the consignee can file a claim, and would have the right to bring a civil action, and there is no requirement to wait any period of time before bringing a suit.

If the party ("owner-operator") that handled the actual transportation was a registered motor carrier, you would have a right under 49 U.S.C. § 14706(b) to recover any amount required to be paid to the owners of the property, plus any expenses reasonably incurred in defending a civil action brought by that person.

If the party was an owner-operator under a lease to your company, you would have to refer to the provisions of the lease, but I would assume that there would be a right to recover by way of an action for indemnification. I would note that your "owner-operator" may well be judgment-proof, even if he carried cargo insurance, since theft by the insured would be an exclusion under the policy.

Note also that the answer may be different if the "freight company" that initially tendered the shipment to you was itself acting as the receiving carrier or freight forwarder and had issued its bill of lading to the "real" shipper. Then its contract of carriage (bill of lading, tariffs) could be relevant.

430) FREIGHT RATES – COMMERCIAL ZONES

Question: Can you please explain what does it mean Commercial Zone Shipments? Are we required to absorb freight charges for the shipments to a consolidation centers located within the same commercial zone? Is it a law that requires shippers to pay freight charges?

Answer: The term "commercial zone" refers to the exemption from the former Interstate Commerce Commission's (I.C.C.) economic regulation of motor carriers that was provided under the Interstate Commerce Act.

Even though the I.C.C. has been "sunsetted" by the I.C.C. Termination Act of 1995, and no longer exists, most of these arcane exemptions still exist.

The commercial zone exemption is presently continued in 49 U.S.C. Section 13506(b) and the FMCSA regulations at 49 CFR Part 372.

The commercial zone exemptions, however, have nothing to do with responsibility for paying freight charges. This is normally a matter of agreement between vendor and purchaser, or between shipper and carrier.

431) FREIGHT TRANSPORTATION CONTRACTS

Question: I have a question regarding the impact of the recent announcement that Yellow/Roadway has purchased the USF companies. I have separate pricing agreements with each carrier that are different and will not expire for some time. Would they still be good and for the duration of the contracts with each company even though they have been sold? In addition, will each carrier still be governed by their individual rules and tariffs or would we be forced to use the Yellow/Roadway versions?

Answer: It is really too early to tell how things will be handled, but I would assume that each of the companies will be maintained as a separate entity for some period of time and there would be no changes to the contracts.

432) INSURANCE - CARRIER CONTRACT PROVISIONS

Question: In our contracts for our carriers, under the insurance section it states, "Each insurance policy required to be carried by the Carrier under this Section will name shipper as an 'additional insured'" ... and "Carrier's Cargo Liability Insurance will name shipper as a 'loss payee'".

Most contracts that I've dealt with in the past have had similar wording regarding the shipper being named as loss payee and I've never had a carrier question it, until now.

The carrier is stating that they are self-insured and do not name the shipper as loss payee for anyone, however, the shipper will be listed as the certificate holder.

Can you tell me what this means to me as the shipper?

Answer: All for-hire motor carriers are required by Federal Motor Carrier Safety Administration ("FMCSA") regulations to maintain minimum levels of financial security, see 49 CFR 387.301. This usually takes the form of public liability (BI/PD) insurance and cargo insurance, and the carrier's insurance company is required to file a certificate of insurance (BMC 91 for BI/PD and BMC 34 for Cargo) with the FMCSA.

The FMCSA can also accept surety bonds in lieu of insurance, and there is a procedure that allows carriers to qualify as a self-insurer, if the FMCSA is satisfied that the carrier has the ability "to satisfy its obligations" for BI/PD and/or cargo liability, see 49 CFR 387.309. If a carrier tells you that they are "self-insured", you should ask for proof of qualification by the FMCSA.

You can (and should) verify compliance with the insurance regulations by accessing the FMCSA website (www.fmcsa.dot.gov) and looking up the carrier (select "Registration & Licensing" and then "Licensing & Insurance").

I would assume that all motor carriers must carry some form of public liability or automobile (BI/PD) insurance. It is not unreasonable for a shipper to ask that it be named as an "additional insured" in its transportation agreement, and to request the carrier to provide a certificate of insurance to that effect. This is a good protection for the shipper in the event of highway accidents, etc., since the carrier's insurer will also be required to defend and indemnify the shipper.

Some transportation contracts also require the motor carrier to have the shipper named as a "loss payee" on the cargo insurance policy. This language is intended to protect the shipper in the event the insurer pays the carrier on a loss/damage claim, but the carrier keeps the money and does not pay the shipper. I would note that, for some reason, both carriers and insurers balk at this requirement, and it is rarely enforced.

433) INSURANCE – CONTRACTUAL AGREEMENT TO PAY PERCENTAGE OF VALUE

Question: The debate is on a claim where the carrier for hire has been contracted by their customer to provide a 10% MSRP on top of the repairs to the vehicles they transport if any damage should occur. Obviously these are brand new vehicles. The questions are whether the insurance carrier for the trucker is responsible to pay this agreed upon 10% diminution in value and whether this is the "destination market value"?

Answer: As you have indicated, the usual measure of damages is the "destination market value" of lost or damaged freight. It would seem to me that the claimant would have to establish that it did in fact incur the specific damages that are claimed -- in this case, the cost of repairs plus the actual diminution in value. The latter would depend on whether there is an allowance or discount given to the customer for distressed merchandise or goods that have been repaired. Just assessing a charge of 10% of the MRSP seems arbitrary and probably could not be substantiated.

It is my understanding that, in the usual motor carrier cargo insurance policy the insurer is only liable to indemnify the carrier for its "legal liability" under the bill of lading, i.e., the amount that a court would award as damages under the Carmack Amendment or other applicable law.

On the other hand, you indicate that the carrier may have agreed in its transportation contract with the shipper to pay the 10% MSRP on top of the repairs to the vehicles they transport if any damage should occur. Then the question is whether the insurance policy covers this contractually-assumed liability.

I think the answer lies in the wording of your insurance policy.

434) INSURANCE - WAIVER OF SUBROGATION

Question: What does it mean when a carrier's insurance policy rejects a waiver of subrogation?

Answer: A waiver of subrogation clause in an insurance policy means that the insurer can't subrogate against the named party if the named party is also negligent and its negligence has caused or contributed to the event that resulted in an insured loss and payment under the policy.

The alternative to a waiver of subrogation is to be named as an "additional insured" on the carrier's BI & PD policy. If you are named as an additional insured, the insurer can't subrogate against you (cannot subrogate against an insured party) and usually also has a duty to defend.

If the carrier or its insurer objects to a waiver of subrogation, then you should insist on being named as an additional insured.

Actually, being named as an additional insured AND having a waiver of subrogation is somewhat redundant -- sort of "having a belt and suspenders" -- you really don't need both.

435) INTERMODAL SHIPMENTS - BLOCKING AND BRACING

Question: When shipping loads via intermodal/piggy back would the obligations to secure the load be the same as if the load were to go over the road? Basically what is the shipper's responsibility versus what the carrier's would be in this situation.

Answer: The standards for proper blocking and bracing depend on whether the trailer/container moves over the road or partly by rail (TOFC/COFC). The rail environment typically involves greater shock, vibration, impact, etc.

Rail carriers will typically decline any claim where it appears that the damage may be due to inadequate blocking or bracing by the shipper. Most railroads have disclaimers of liability in their exempt rail circulars and/or require compliance with their TOFC Loading and Blocking Manual or the Intermodal Loading Guide published by Railinc. (Note: Railinc was formerly a subsidiary of the Association of American Railroads and was spun off by the AAR in 1999).

You can purchase the Intermodal Loading Guide, DP 348, from:

Railinc
7001 Weston Parkway, Suite 200
Cary NC 27513

1-800-544-7245

You can also order through their website: http://www.railinc.com

Railinc also has many other publications dealing with rail transportation of specific commodities.

You can also ask your carriers to send a damage prevention expert to your facility to advise you as to proper loading procedures. (If you follow their advice, it makes it more difficult for them to decline your claims!)

436) LIABILITY – "ACT OF GOD"

Question: In a recent TRANSDIGEST issue, there was a question regarding water damages incurred by flooding in a warehouse. One of your answers (#3) makes reference to a carrier's defense: "Act of God." Part of your explanation states that it must be a "bona-fide" event, such as a hurricane, tornado, etc.

My question is: What about severe snowstorms? We experience what the locals call "Nor'easters," which have prompted some of our carriers to shut down for the extent of the storm. We have had missed deliveries after pickup (some were guaranteed deliveries) which one carrier declined because they averred the snow storm was "An Act of God."

Answer: If you review the court decisions on this subject, you will find that storms, including "Nor'easters", are not generally considered "Acts of God."

This is even truer today because of improved weather forecasting, which provides ample notice of approaching bad weather and opportunity to take precautions well in advance of the event.

I would also point out that a common carrier has a 2-pronged burden of proof. It must not only prove that the event amounted to an "Act of God", but also that it was free from any negligence that may have caused or contributed to the loss.

If a carrier accepts a shipment, knowing that a severe storm is on its way, I would think it assumes liability for a failure to deliver the shipment with "reasonable dispatch", or by the "guaranteed" delivery date, if there is one.

437) LIABILITY – AIR OR SURFACE

Question: I read an article discussing how airfreight forwarders use air bills with released value clauses. The issue was raised concerning freight that moves on an air bill, but then moves only by ground. If I understood the article it stated that the carrier was liable for the full value of the damage because the air bill was not enforceable since "the freight never left terra firma". Is this correct?

Answer: There is authority for the position that a liability limitation in an air freight forwarder's air waybill is unenforceable if the shipment moves solely over the road by truck, see *Hartford Fire Insurance Co. V. Ltd Air Cargo, Inc.*, NO. 97-583-Civ-Middlebrooks, 1999 Fed.Carr.Cas. 84117 (SD Fla. Nov. 18, 1998. The court held that "A company may not evade the strict liability imposed by Carmack by calling its contract form an 'air waybill', then arranging for shipment by ground transportation." Furthermore, the court held that the carrier failed to provide the shipper with "a reasonable opportunity to choose between two levels of liability", and failed to obtain the shipper's "agreement as to its choice." The court concluded by holding that merely by stating that electing higher coverage "would cost extra" without providing that additional cost somewhere "does not provide a shipper with a choice between two levels of liability."

438) LIABILITY – AIRBILL LIMITATIONS ON SURFACE MOVES

Question: Our company currently does business with a logistics provider, to deliver furniture to residential customers. Merchandise is picked up from our distribution center, or other vendors, consolidated, moved by surface to delivery agents and delivered to customers. These activities conform to the definition of a surface freight forwarder. The logistics provider's representatives state they are an international and domestic air freight forwarder and use an air waybill, with liability at $0.50 per pound for domestic shipments unless additional insurance is purchased.

In accessing the FMCSA database, this logistics provider has two licenses:

DOT # 887445, Docket FF003500, with contract authority

DOT # 887445, Docket MC386732, with Common, Contract and Broker authority

It is my contention that this logistics provider is performing services of a domestic surface freight forwarder and Carmack liability should apply. I would appreciate your thoughts and advise as to other reference sources to support my position if you concur they are a surface freight forwarder in this case.

Answer: You are correct. Unless the shipment actually moves by air, it is subject to the Carmack Amendment.

But that doesn't completely answer the question as to whether the liability limitation on the air waybill is enforceable. That would depend on the basic common law principles: an agreement in writing (bill of lading or incorporated tariff provision), adequate notice of the limitation, a choice of rates, etc. This particular area is troublesome because there is no definitive precedent in the court decisions.

As a result, unless this liability limitation is satisfactory, you should either negotiate for an adequate liability limitation or purchase the insurance in order to be protected. Otherwise, you

will face the cost of either litigating the matter or eating the difference between the $0.50 per pound limitation and the actual value.

439) LIABILITY – AUTHORITY OF LAW; BORDER DELAYS

Question: The "Authority of Law" exception to liability on a bill of lading usually deals with the seizure of contraband, illegal goods, etc. What about delays by customs officials, such as at the Detroit/Windsor border crossings, which result in a carrier missing an appointment? If there is a drop in value to the product because of the delay, is the carrier liable for the difference in values? This appears to be an every day occurrence now due to increased security at our borders. Would Authority of Law protect a carrier in this kind of situation?

Answer: Each claim is dependent upon its unique factual circumstances. However, under the factual situation as you have summarized it, the carrier should be protected by the Authority of Law exception.

A carrier can decline a claim if it can prove that the delay and lost value occurred as a result of Authority of Law and that the carrier is free from negligence. All parties to the transaction (carrier, shipper and consignee) know full well that a shipment such as this will be inspected by customs. In other words, the delay is a foreseeable, temporary interruption in the shipment.

Therefore, a claimant may only recover if it can show that somehow the carrier's actions, independent of the customs officials, were instrumental in causing the delay. Also, in your scenario where the loss in value is caused by delay, the claimant would need to show that the carrier did not deliver with reasonable dispatch. Again, if the shipment were a few days late, it would be difficult for a claimant to show a lack of reasonable dispatch.

440) LIABILITY - BILLS OF LADING

Question: I am interested in learning about bills of lading. Specifically, how binding is a signed bill of lading? If a carrier signs the form at the pickup point but then later does not have the paperwork in their system to support the receipt, who is responsible for the proof that the freight was picked up? Do you have any codes to site in support of what I believe would be the carrier's liability?

Answer: Under federal law, the "Carmack Amendment" (49 U.S.C. §14706) a motor carrier is required to issue a bill of lading or receipt when it receives goods for transportation. The text of the relevant statute is as follows:

> Sec. 14706. Liability of carriers under receipts and bills of lading
>
> (a) GENERAL LIABILITY-
>
> (1) MOTOR CARRIERS AND FREIGHT FORWARDERS- A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading. 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 and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier

performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

Sometimes carriers provide their own bills of lading, but in practice, bills of lading are often prepared by the shipper and given to the carrier's driver to sign.

As a shipper, you should ALWAYS require the driver to sign a receipt or bill of lading with the package count and a description of the goods, and RETAIN the shipper's copy. This is your proof that the carrier received the goods, and it also constitutes a "contract of carriage" (a legal document).

441) LIABILITY – BROKER NEGLIGENCE

Question: Very simply: in the context of a negligence action against a broker for liability regarding a stolen shipment of electronic goods, do brokers have an implied duty to ensure safe delivery of cargo? We believe the broker was negligent in its selection of the carrier (no liability insurance, record of past felonies, etc.). The shipment was stolen under very mysterious circumstances. The problem is, the contract between the shipper and broker was oral, and it does not appear that the broker expressly agreed to ensure the shipment made it to its destination without loss/damage.

Answer: As a general rule, brokers are not liable for loss, damage or delay to goods in transit. However, a number of recent court decisions reinforce the principle that brokers can be liable if they are negligent, and their negligence causes or contributes to the loss, see e.g., *Professional Communications, Inc. v. Contract Freighters, Inc.*, 171 F.Supp.2d 546 (D.Md., Oct 17, 2001) (NO. CIV. CCB-00-CV1309); *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 WL 965686 (N.D.Ill., Oct 15, 1999) (NO. 98 C 5182); *Commercial Union Ins. Co. v. Forward Air, Inc.*, 50 F.Supp.2d 255, Fed. Carr. Cas. P 84,107 (S.D.N.Y., Jun 14, 1999) (NO. 98 CIV. 6814 (AGS)).

It has become common for brokers to be involved in loss & damage claims and lawsuits under various theories: negligent carrier selection (unlicensed or uninsured carriers, etc.); failure to transmit critical information (special equipment or protective services needs, etc.).

The problem is establishing some direct causal relationship between the alleged negligence and the loss.

442) LIABILITY – CARRIER REPACKAGES LOAD

Question: Recently, we utilized a company that provides scheduled LTL services between most airports. Catering to the freight forwarder industry, they are a limited liability carrier, offering insurance through the use of a declared value field on their bill of lading. The back of their bill outlines their liability, including the phrase "agrees to pay for loss or physical damage to the DESCRIBED SHIPMENT which may be caused by its negligent and willful conduct".

Here's the scenario. We tendered a shipment to this carrier without declaring a value. This shipment, when tendered to the origin terminal, consisted of a 9 foot long by 8 foot wide pallet. The materials that were being protected and shipped were located in the middle of this pallet, and could have quite easily fit into a single pallet position. However, the shipper had found that even though they paid more in freight charges, by shipping this way, the product was protected. When this shipment arrived at its final destination, there were pieces falling off a standard size pallet.

When this shipment arrived at the interline terminal, it was decided by the carrier, due to lack of space on the line haul truck, to remove the product from the oversize pallet and place the individual pieces on a standard pallet. Needless to say, the pieces were damaged.

This carrier has taken the position that no matter what happened, we did not declare a value, so they are only liable for $.50 pound. I questioned the wording on the back of their bill, which read " shipper warrants that the shipment identified on the reverse side is properly packaged to withstand the rigors of transportation...."

I told them that this was no longer the shipment I tendered, otherwise I may have opted to declare a value.

They flat out told me that they can do whatever they want with a shipment, including uncrating a machine and ship it loose, and as long as there is no declared value on the bill, they are not liable for more than their limit.

I realize that this may have gotten lengthy, but this is a big company and I just can't believe that they can do this. The integrity of this particular shipment was totally changed, and they are just hiding behind a declared value statement.

Answer: Unfortunately liability limitations such as the one you have described are usually upheld by the courts, provided they meet certain basic requirements (adequate notice on the bill of lading, a rule limiting liability in a tariff or service guide, and an opportunity to choose the level of liability, etc.)

Other than conversion (carrier's appropriation of the goods for its own use), negligence or carelessness in handling is not an exception and does not avoid the liability limitation. This subject is discussed at length in *Freight Claims in Plain English* (3rd ed. 1995) at Section 8.0.

443) LIABILITY - CARRIER SELECTION BY 3PL

Question: Can the shipper be held responsible if the broker/freight forwarder/3PL selects an unsafe carrier?

My shipper/customer is trying to force us to offer loads on the Internet to the lowest bidder, we have never done this and don't intend to as we do not have the time to make sure that we have a safe carrier, and the small contribution to profit and overhead on these type loads don't support the perceived risk.

Our competition, a licensed broker, posts all his shipments on the Internet. It gives them to the lowest bidder, and does not bother to check operating authority, cargo insurance, or safety information on the carriers.

Our shipper feels he has no obligation in regards to safety. Do you feel this is correct? In cases such as the *C. H. Robinson* case did anyone try to bring the actual shipper into to these legal actions?

Answer: I will assume the following facts: a shipper contracts with an intermediary (licensed broker, freight forwarder or 3PL) to transport its goods; the intermediary in turn contracts with a motor carrier, and the motor carrier has an accident or collision while transporting the goods resulting in injury or death to a third party. The question is whether the shipper can be held responsible if the intermediary selects an unsafe carrier.

Some general rules: (1) brokers or freight forwarders would be considered independent contractors; (2) the primary liability for a highway accident is on the authorized carrier, more specifically the operator of the power unit; (3) an owner-operator under a lease may have primary or secondary liability; (4) under certain circumstances and depending on state laws, the owner of the trailer may have vicarious liability.

Normally a shipper would not have liability to third parties for a highway accident. However, a shipper could have liability to the public if (1) it was negligent in loading, blocking, bracing, etc. and its negligence caused or contributed to the accident and the injury, or (2) it was the owner of the trailer, as mentioned above. As an example, shippers have been held liable where they loaded large rolls of steel on a flatbed trailer, which came loose in transit and caused accidents.

Shippers have also been held liable where they failed to secure cargo which fell over during unloading, injuring a driver.

Except for the situations described above it is unlikely that a shipper would have liability if it deals solely with an intermediary, and the intermediary independently selects the actual carrier. This does NOT mean, of course, that an injured party will not sue a shipper (shotgun approach) under some legal theory, especially if the carrier or intermediary is out of business or is judgment proof. Even if it is determined that there is no liability, this could be costly because of the legal fees to defend the suit.

I am not aware of any court decisions in which a shipper was found liable because it used an irresponsible broker that only selects the lowest bidder without regard to its safety record, licensing or insurance.

There is a recent Maryland District Court case in which the plaintiff sued various parties, including C.H. Robinson, which had acted as a broker. In that case, after discussing alternate theories of liability, the court ultimately determined that C.H. Robinson was not liable on any of the theories, except possibly that of negligent hiring.

444) LIABILITY - CARRIER'S DRIVER OPERATING SHIPPER'S FORKLIFT

Question: Our Safety Manager has brought a concern about our shipping contracts, especially one with a particular carrier. Apparently we have a driver for that carrier that operates one of our forklifts and we want to protect ourselves in case he gets hurt. Is the following indemnity clause as it reads below enough to cover us? If not what would you recommend?

a. CARRIER shall at all times indemnify, defend and hold harmless SHIPPER, its agents and employees against and from any and all claims directly or indirectly arising out of or related to the negligence or willful misconduct of CARRIER in the performance of the services provided and for breaches of CARRIER's obligations hereunder (including, without limitation, claims for personal injury, death and damage to property, clean–up costs from commodity spills and damage to the environment) asserted against SHIPPER (i) by any agent or employee of CARRIER or (ii) by any other person.

Answer: Ordinarily an employee injured in the course of his employment would be covered and compensated by his employer's Worker's Compensation insurance (and would have no other claim against his employer, even for negligence).

However, this would not preclude an action against a third party (such as a shipper or consignee) if the worker/driver were injured as a result of the negligence of the third party. Thus, your company could have liability if it furnished an unsafe forklift or there were some other negligence on the part of your company that caused or contributed to the employee's injury. Shippers and consignees are often sued in such "loading/unloading" situations, or when improperly secured freight falls on them, etc.

The indemnity clause you provided does not address this. It covers the "negligence or willful misconduct of CARRIER...", and not any negligence of the shipper or consignee.

I would assume that your company does carry appropriate General Liability coverage for any guests, licensees, etc. that would be on their premises.

445) LIABILITY – CERTIFICATE HOLDER OR ADDITIONAL INSURED

Question: We are a shipper for our own products. We recently obtained a freight forwarder license in order to be able to consolidate other freight with ours to save all customers freight costs. We are also a 3PL company as we warehouse product too.

We presently contract with all carriers and are listed as a certificate holder on their insurance policy. Is there an advantage as a 3PL to be listed as additional insured or are there more risks involved in doing so?

Answer: You really don't get much protection as a "certificate holder" for a number of reasons. First, the certificate doesn't tell you what is in the underlying policy as far as deductibles, exclusions, limitations, etc. Second, even though the insurer should notify you if the policy is canceled or modified, it is not legally responsible if it fails to do so.

If you are a named insured on a policy, then the insurer can't cancel coverage without notifying you. Also, the insurer will be obligated to provide defense under the policy in the event that some third party sues you, as well as the carrier.

446) LIABILITY – COGSA OR WARSAW

Question: If a shipment was meant to travel via air and an airway bill was issued but the shipment was diverted and loaded into an ocean container instead (no ocean bill was issued, consolidated shipment), which would apply for legal liability purposes, COGSA or Warsaw? I am being told that neither apply, which I feel is incorrect. An air bill was issued for the freight and even though it did not travel air the limits of the air bill should apply. Please advise your comments.

Answer: It is an interesting question, but I think the answer is clear: the Carriage of Goods by Sea Act (COGSA) is a statute that applies to ALL "contracts for the carriage of goods by sea to or from ports of the United States". It makes no difference what kind of bill of lading is issued, and certainly an air waybill could not override or change the statutory liability regime prescribed by COGSA.

447) LIABILITY – CONSIGNEE'S LIABILITY TO THIRD PARTIES

Question: Is there any statute that protects a consignee from legal action when the truck-carrying product for that consignee is involved in a fatality?

Scenario: Flatbed truck carrying product consigned to one of our stores is parked on a frontage road outside the gates of our store, waiting for it to open. The truck is parked in plain view, with hazard lights engaged, and is struck from behind by a vehicle. The occupant of that vehicle dies.

Are there any common carriage of goods laws protecting a consignee from liability in a road accident? From the perspective of our store being the recipient? Or from passage of title to the goods? The shipment of goods is on a private fleet truck owned by the shipper. The terms of carriage are prepaid, not FOB. Ownership has not yet passed, as the cost and responsibility for the freight is with the shipper. We have not yet taken delivery. What is your opinion?

Answer: As a general rule, a shipper or consignee is not liable for injuries to third parties resulting from a highway accident. There are, of course, some exceptions, for example, if the damage or injuries resulted from improper loading by the shipper which caused or contributed to the accident, etc.

You indicate that this was a "private fleet truck owned by the shipper". Under that situation, the shipper might have some liability if the vehicle was negligently parked or improperly lighted. But that liability arises only from the ownership and operation of the vehicle, and not the cargo.

I can't see how the consignee of the cargo has any liability, regardless of the FOB terms or title to the goods on the truck.

448) LIABILITY – DELIVERY TO PROPER PARTY

Question: The Bill of Lading stated the shipment was a residential delivery going to a person (not listed as a business). However, this was actually a law office. The person named as the consignee was the lawyer who happened to be in court at the time of the delivery. His secretary signed for the shipment clear in good order with no exception. Five days later we received a call from the customer stating he did not receive all of his freight that it was short. He is stating because the person who signed for the delivery was not the consignee as set forth on the Bill of Lading, we are automatically liable. Is this true? If this is not true can you provide me with the information to go back to him with?

Answer: I don't think you are "automatically liable".

It would appear that there was a delivery, that it was to the correct address, and that it was received by someone who had apparent authority to accept the shipment and sign the delivery receipt. But that doesn't dispose of the real question: was there a loss (shortage) that occurred in transit, while the goods were in the possession and control of the carrier.

As with all loss or damage cases, the burden is on the claimant to prove that the goods were tendered to the carrier at origin, that there was loss or damage at the time of delivery, and its damages. If this was a concealed shortage, then there is a greater burden on the claimant to show what was actually shipped, and what was actually delivered (and that the shortage did not occur sometime after the delivery).

449) LIABILITY – DIVERSION OF RAIL CAR

Question: The following scenario occurred:

*Loaded railcar (hopper) ships from plant site and is billed to ship to consignee in Tracy, CA.

* Freight terms are prepaid by shipper.

*Railcar is diverted in route by consignee to Mulford, CA.

*Consignee pays for diversion.

*Shipper is unaware of diversion.

*Railcar is successfully diverted to Mulford, CA.

*Railcar is weighed and is loaded.

*Consignee contacts shipper and asks for railcar to be diverted to City of Industry, CA.

*Railcar is successfully diverted by shipper.

*Railcar is NOT weighed.

*Upon placement at City of Industry, railcar is empty.

Questions:

What parties are legally able to divert rail cars?

Once diversion takes place, is the party who requests diversion responsible for lading?

Does the shipper remain responsible for lading (even though shipper did not request or know of initial diversion)?

Answer: Most rail shipments are subject to the railroad's "Exempt Circulars" (tariffs) which contain the rules applicable to diversion and reconsignment. Unless otherwise provided, either the shipper or the consignee named in the bill of lading can request that a car be diverted. Many shippers have transportation agreements with the railroads; often these agreements specify that only the shipper may request a diversion or reconsignment.

As for which party is "responsible" after a car has been diverted, there are two answers.

First, the carrier is responsible for any loss, damage or delay while the goods are in its possession, subject to the provisions of the bill of lading and tariffs.

Second, the risk of loss in transit generally depends on the terms of sale, i.e., the contract between the buyer and the seller. Normally, under the Uniform Commercial Code, if a shipment

is “FOB Origin” or equivalent, the risk of loss passes to the buyer once the goods are tendered to the carrier at the point of origin. If the shipment is “FOB Destination”, the risk of loss remains with the seller during transit. Without seeing your purchase agreement, I cannot give an opinion as to which party would have risk of loss under the circumstances described.

From the fact pattern you have described, it sounds as though the consignee may have actually received the car at Mulford and taken possession of the shipment. If so, regardless of the original terms of sale, delivery had been accomplished and any loss occurring after that point should be at the risk of the consignee.

450) LIABILITY – DOUBLE BROKERED LOAD

Question: The Company I work for is a 3PL (broker). We consolidate LTL perishable into full, multiple drop loads. These loads are then tendered to a contract carrier (Carrier A) from which we have insurance certificates showing my company as the certificate holder. As a general practice we voluntarily pay freight claims to our customers (shippers) when valid even if we do not get the money from the carrier. We follow the proper route when filing these claims with our contracted carrier (Carrier A). My question is what kind of liability are we open to if the contacted carrier uses their brokerage authority and brokers the load to a different carrier (Carrier B) that is running under Carrier B’s own authority? What happens if there is a claim and both carriers are unwilling to pay claim and insurance companies decide not to pay claim because freight was “double brokered”?

What if Carrier A’s brokers bond is not enough of an amount to cover the claim? And what if there are multiple claimants going after the bond?

Answer: I would look to see if the 3PL you work for has some kind of formal written agreements with the carriers it uses, and would look first to the agreement to see what it says about the carrier’s liability.

That said, it seems to me that your only contract is with Carrier A. If they choose to sub-contract or “double broker” a load to Carrier B, it is for their own convenience and should not affect their contractual liability to your company. Likewise, whether their insurance company covers the loss or declines coverage has no bearing on the liability of Carrier A.

As to what can be done, if the carrier will not pay the claim it may be necessary to take legal action. If so, the shipper should bring a lawsuit, and it would probably be advisable to sue both of the carriers involved. If your company has voluntarily paid the shipper’s claim (which, as a broker, it generally has no legal obligation to do), then your company would have to get an assignment of the claim from the shipper and proceed against the carriers.

I would note that problems such at these can generally be avoided by a properly drafted transportation agreement.

Regarding the question about a broker’s bond, note that the FMCSA only requires a broker to have a $10,000 surety bond. It is not uncommon for claims to exceed the amount of the bond. If there are multiple claimants against the bond, the surety company will usually only make a pro-rata payment to each claimant, up to the limit of the bond.

451) LIABILITY – DOUBLE BROKERED SHIPMENTS

Question: A shipper contacts broker A to arrange a shipment and broker A contacts broker B to arrange said shipment which broker B accomplishes using an authorized carrier. First question, is this a legal transaction? If this is legal, who has the ultimate rights to payment assuming the authorized carrier has been paid? In other words if both brokers are demanding

payment from the shipper, who should be paid? If this same load has a freight claim on it, who is responsible to the shipper for the claim?

Answer: The situation you describe is referred to as "double brokering" and is legal, although it often leads to problems.

The shipper has a contract with the first broker; the first broker has another contract with the second broker, and the second broker has a contract with the carrier. Thus, the shipper only has liability to the first broker. In the event of conflicting claims, I would suggest that you get a "hold harmless" or indemnity agreement from the first broker before making payment.

As for loss or damage claims, the general rule is that a broker is not liable. Claims should always be filed with the actual carrier that was in possession of the goods at the time of the loss or damage.

The best way you can protect your company against this kind of problem is to have a good, written transportation contract with the brokers or the carriers that you deal with.

452) LIABILITY – DOUBLE BROKERING A LOAD

Question: I double brokered a load to a carrier. The carrier did not maintain correct temperatures during transit and the shipment was refused and sold as salvage by a third party. Can the shipper or the broker who gave us the load sue us for the damages? I am thinking we are just acting as a broker, the shipment was not in our custody or care. The broker or shipper should file with the carrier.

Answer: It is true that brokers are generally not liable for loss and damage claims. However, brokers may become liable to the shipper: (A) where the broker holds itself out to be a carrier; (B) where the broker is negligent, or (C) where the broker has assumed liability by express or implied contract.

You indicate that a broker tendered the subject shipment to your company for transportation and that you "double-brokered" the shipment to another carrier. According to the Federal Motor Carrier Safety Administration ("FMCSA"), your company holds authority both as a motor carrier and also as a broker. Thus, the question is whether your conduct may have placed you within one of the three exceptions listed above.

For example, if you did not make it clear that you were handling this shipment as a broker, and not as a motor carrier, the shipper (and first broker) would have valid grounds to assume that you would actually transport the shipment and assume liability for any loss or damage in transit.

Whether or not you may be liable for the loss or damage to this shipment depends on the specific facts and circumstances. In any event, if a claim is filed against your company, you should do two things: (A) advise the shipper and the first broker that you acted solely as a broker and did not assume any liability for the loss or damage, and (2) promptly transmit the claim to the responsible motor carrier.

453) LIABILITY – DROP TRAILER SHIPMENTS

Question: I am researching drop trailer agreements for my company and would like to read the appropriate decisions. Would you list the court cases, please?

Answer: The following excerpt from the forthcoming edition of *Freight Claims in Plain English* addresses the question you have raised.

3.0 BEGINNING AND ENDING OF CARRIER LIABILITY

3.1 WHEN LIABILITY BEGINS

Common carrier liability begins only after acceptance of the bailment agreement by the carrier. Such acceptance takes effect when the goods are placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge and consent. Thus, making available to the shipper a vehicle for loading by the shipper or a vehicle for the possible temporary storage of goods by the shipper does not constitute an acceptance of bailment. *Avisun Corp. v. Mercer Motor Freight, Inc.*, 321 N.Y.S.2d 658 at 660 (App. Div. 1971).

Furthermore, the shipper must give the carrier appropriate shipping instructions. *Republic Carloading & Distribution Co. v. Missouri Pacific R.R. Co.*, 302 F.2d 381 at 385 (8th Cir. 1962).

For liability as a common carrier to commence, a shipper must complete delivery, and the shipment must be accepted by the carrier. *Dugdale Packing Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 347 F.Supp. 1276 (W.D. Mo. 1972); *Mattel, Inc. v. Interstate Contract Carrier Corp.*, 722 F.2d 17 (2nd. Cir. 1983); *Conair Corp. v. Old Dominion Freight Line, Inc.*, 22 F.3d 529 (3rd Cir. 1994); *Industrial Risk Ins. v. United Parcel Service*, 746 A.2d 532, 328 N.J.Super. 584 (N.J.Super.AD 2000).

What constitutes a delivery and acceptance by the carrier is a question of fact. In *Dugdale*, supra, the shipper loaded a refrigerated trailer on a Saturday with meat. It knew the trailer could not be picked up by the railroad until the following Monday. All operations with respect to loading, sealing and moving to the shipper's parking lot were performed by the shipper. The trailer remained in exclusive possession of the shipper, no shipping instructions had been issued, no bill of lading had been delivered to the carrier, and no notice had been given by the shipper that the trailer had been loaded. The Court held there was no delivery of the shipment and the carrier would not be liable for spoilage of the meat due to the heating of the trailer.

See also, *Hohenberg Bros. Co. v. Missouri Pacific R.R. Co.*, 586 S.W.2d 117 (Ct.App. Tenn. 1979) (finding no complete delivery when car could not be removed from shipper's premises until shipper had "ordered out" car; something remained for shipper to do as condition precedent to commencement of transportation); Cf., *Kessler Export Corp. v. Reliance Ins. Co.*, 207 F.Supp. 355 (E.D. N.Y. 1962), aff'd, 310 F.2d 936 (2d Cir. 1962) (where carrier signed bill of lading upon loading truck but shipper agreed to house loaded truck in its warehouse over the weekend and only shipper had keys to warehouse, insurance covering goods in transit did not cover loaded truck because goods remained on shipper's premises).

Dugdale should be compared, however, with *Conair Corp. v. Old Dominion Freight Line, Inc.*, 22 F.3d 529 (3rd Cir. 1994). In that case, Conair's employees had loaded a trailer owned by the carrier, and upon completion of loading, one of the carrier's drivers signed the bills of lading. That driver, however, did not remove the trailer and Old Dominion arranged to have another driver pick up the load later that evening. When the other driver arrived, the trailer was missing, presumably stolen from Conair's premises. The threshold issue was whether the carrier had "received" the goods. The court held the carrier responsible, stating:

> It is undisputed that Old Dominion's trailer was completely loaded and prepared for transportation at the time Jolacoeur signed the bills of lading, evidencing receipt of the trailer by Old Dominion. Upon loading the goods into Old Dominion's trailer and signing the bills of lading, there was no further action required by Conair before transportation of the shipment by Old Dominion. At that point, Conair released the trailer to Old Dominion for immediate transportation and Old Dominion had complete and exclusive control of the goods. It was Old Dominion's sole

> decision whether to remove the trailer immediately or delay removal for its convenience. It chose to send one driver to Conair to sign the bills of lading and not to remove the truck from Conair's premises until later that day. Old Dominion thus had constructive, if not actual, receipt and possession of the shipment at the time of the theft. Id. at 532.

A similar result was reached in *Mattel Inc. v. Interstate Contract Carrier Corp.*, 722 F.2d 17 (2d Cir. 1983), a case which was decided under New York state law. In *Mattel*, the parties loaded the trailer, the carrier then signed the bill of lading, and the trailer remained on the shipper's premises awaiting arrival of the carrier's driver when the trailer was stolen. The Second Circuit Court of Appeals held that "it is not the location of the goods which is controlling in such circumstances, but rather who it is that had actual or constructive possession of the goods." Id. at 19. The court stated:

> The trailer supplied by Interstate was loaded, counted, and apparently sealed, and a bill of lading was signed and issued by the carrier's representative on the premises. There was no further action that Mattel was to take to bring about transportation. The only action left was to be taken by the carrier, who had to arrange for his independent tractor operator to call for the trailer and haul it away. As nothing was left to be done by the shipper, the trailer remained on the shipper's premises merely as an accommodation for the carrier. Id.

In *Industrial Risk Ins. v. United Parcel Service*, 746 A.2d 532, 328 N.J.Super. 584 (N.J.Super.AD 2000), there was a long-standing relationship where the shipper would load goods onto a UPS trailer and notify it when the trailer ready. UPS would then pick up the trailer and leave a new empty trailer in its place for the next load. A "pickup record" was filled out by UPS employees each time they left with a trailer for delivery

On this occasion, thieves impersonated UPS employees and stole the goods from the trailer. The shipper claimed the $100 per package liability limitation did not apply because the goods had not been delivered to UPS when they were stolen. The Court found the liability limitation still applied. It noted, regarding "pre-movement" activities, that carrier responsibility attaches when there are no further acts to be done by the shipper and all that remains to be done is for the carrier to begin transport, citing Mattel and Conair in support. Further, the court noted that the shipper implicitly agreed that if the goods were stolen by UPS employees, the liability limit would apply, and there was no reason to make a distinction in that respect simply because the thieves were not UPS employees.

3.2 WHEN LIABILITY ENDS

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. *Danciger v. Cooley*, 248 U.S. 319, 327 (1919). Delivery is the placement of the vehicle in a position for unloading. The mere arrival of goods at their destination does not reduce the liability of the carrier where anything remains to be done by the carrier to effectuate delivery. *Seaboard Allied Milling Corp. v. Consolidated Rail Corp.*, unreported, (D. Colo. 1980); *Keystone Motor Freight Lines v. Brannon-Signaigo Cigar Co.*, 115 F.2d 736 (5th Cir. 1940); *Gen Am. Transp. Corp. v. Indiana Harbor Belt R. Co.*, 191 F.2d 865 (7th Cir. 1951); *Brockway Smith Co. v. Boston and Maine Corp.*, 497 F.Supp. 814 (D.Mass. 1980); *Intech, Inc. v. Consolidated Freightways, Inc.*, 836 F.2d 672 (1st Cir. 1987)

Delivery of a rail car is normally effected when the car is placed on a team track or spotted. *Republic Carloading & Distribution Co. v. Missouri Pacific R.R. Co.*, 302 F.2d 381, 386 (8th Cir. 1962). However, in *Seaboard*, a carrier temporarily left a railroad car in constructive placement on some side rails to await orders for the car to be moved for actual placement to the unloading spot. While the carrier was waiting for orders, the car was vandalized. The court held the carrier liable since the car had not been delivered before the damage occurred.

On ramp-to-ramp rail traffic, delivery by the railroad is completed when the railroad delivers the car to the destination ramp and notifies the consignee that the shipment was available to be picked-up. *Intercargo Insurance Company v. Burlington Northern Santa Fe Railroad*, 185 F. Supp. 2d 1103 (C.D. Calif. 2001).

In *Intech, Inc. v. Consolidated Freightways*, Inc., 836 F.2d 672 (1st Cir. 1987), the carrier had transported a sawcutting machine and its accessories in two containers from California to Acton, Massachusetts. Upon arrival of the first container at the consignee's facility, there was a dispute as to who was responsible to unload the machine, and the container sat there for some six months, when C.F. finally came back and removed it. Another five months passed, and the consignee went to inspect the machine at C.F.'s yard, when it was found to have been damaged. While the issue centered on whether a claim was timely filed, the court discussed the issue of the carrier's liability, and noted that there had been no delivery so long as anything remained to be done by the carrier, such as unloading. Thus, but for the failure to file a claim within nine months from the date delivery should have been made, the carrier remained liable for any loss or damage to the machine.

The case of *PolyGram Group Distribution, Inc. v. Transus*, Inc., 990 F.Supp. 1454 (N.D.Ga. 1997) involved a mis-delivery of some 67 cartons of sound recordings intended for a new Media Play store in Gainesville, Florida. The shipment was supposed to be sent to a distribution center in Minneapolis, but was in fact sent to the new store that was still under construction and had not yet opened for business.

The carrier delivered the shipment to the site and apparently obtained the signature of one of the construction workers. It was later discovered that most of the cartons had disappeared. The issue was whether proper delivery had been completed by the carrier, and the court stated:

> Accordingly, under *Intech*, a common carrier can effect "delivery" by merely depositing the merchandise at the consignee's place of business without acceptance or rejection by the consignee. See *Intech*, 836 F.2d at 674; see, e.g., *Interocean*, 865 F.2d at 703 (carrier's liability terminated under bills of lading after containers reached destination and arrived at warehouse); *Caporicci Footwear, Ltd. v. Roadway Package Systems, Inc.*, 894 F.Supp. 265 (E.D.Va.1995) (common carrier who delivered goods to proper location identified in papers and who left goods in storage bay as instructed with person falsely identifying himself as representative of consignee despite observation of representative loading U-Haul truck discharged contractual obligation and was not negligent). Because Transus did this, and PolyGram has not shown that the goods were in diminished condition at the time of said delivery, the allocation of risk of loss shifted to PolyGram. Moreover, liability extinguished under both the Carmack Act and the Federal Bills of Lading Act.

In *Tokio Marine & Fire Ins. Co., Ltd. v. Chicago & Northwestern Transportation Co.*, 129 F.3d 960 (7th Cir. 1997), Matsushita contracted with API (an intermodal

service provider) and Amato (a local motor carrier) to transport Panasonic goods from Tacoma, Washington to Arlington Heights, Illinois. API had a "stack train" arrangement with the Union Pacific Railroad Company and the C & NW. C & NW was to handle the interchange of the Panasonic goods when they arrived at the C & NW railhead in Chicago. Then Amato was to provide transportation from the C & NW railhead to Panasonic's Arlington Heights, Illinois warehouse.

The containers left Tacoma on or about December 12, 1989 and arrived at the C & NW Chicago railhead on the morning of December 16, 1989. On December 15, C & NW notified Amato that the containers would be made available to Amato on December 16 for delivery to the Arlington Heights warehouse of Panasonic. Amato itself was unavailable to pickup the containers and subcontracted with Raven (another local motor carrier) to deliver them to Panasonic. Amato gave Raven the container numbers and special pickup numbers to obtain the release of the containers at the C & NW railhead. When Raven's driver arrived to pickup the container, it was discovered that the container had been stolen by an impostor. The missing container was never found, causing Matsushita $490,311.41 in damages.

The Court of Appeals upheld dismissal of the action against the C & NW and API on the grounds that delivery of the container had been completed, stating:

> With respect to C & NW and API, the Carmack Amendment (49 U.S.C. § 11707) pre-empts common law remedies for negligent damages of goods shipped under a proper bill of lading. *Tokio Marine & Fire Insurance Co. v. Amato Motors*, 996 F.2d 874 (7th Cir.1993). However, neither carrier here violated the Carmack Amendment because the goods were transported from the C & NW ramp in Tacoma, Washington to its ramp in Chicago, placed on the chassis and the consignee, or notified party, was informed that the containers were available to be picked up. Nothing more was required by API's transportation agreement with Matsushita. *Schiess-Froriep Corp. v. S.S. Finnsailor*, 574 F.2d 123, 127 (2d Cir.1978); *American President Lines, Ltd. v. Federal Maritime Board*, 317 F.2d 887, 888 (D.C.Cir.1962). Delivery occurred when Amato was notified by C & NW that the containers had arrived at its pickup facility and had been placed on a chassis there. Liability of the two carriers terminated upon delivery of the shipment to the C & NW pickup chassis. *Republic Carloading & Distribution Co. v. Missouri Pacific R.R. Co.*, 302 F.2d 381 (8th Cir.1962); *Illinois Central R.R. v. Moore*, 228 F.2d 873 (6th Cir.1956). Therefore neither C & NW nor API is liable to plaintiffs.

The case of *Indemnity Insurance Co. of North America v. Hanjin Shipping*, 348 F.3d 628 (7th Cir. 2003) involved a shipment of tools from Shenzhen, China to a Lowe's facility in North Vernon, Indiana, moving under a through multimodal ocean bill of lading. As the shipment approached Chicago, Lowe's customs agent, Fritz Companies, directed Hanjin to release the shipment to a motor carrier so that it could be taken to a U.S. Customs facility for an intensive customs examination. The container was delivered to a station operated by O'Hare Services, which in turn had contracted with Channel Distribution to perform the actual inspection. After the inspection had been completed, the container sat for over a week in Channel's unprotected yard, and was finally stolen.

The lower court had held Hanjin liable for the loss, but the 7th Circuit reversed, noting that Hanjin's duty under the waybill was to deliver the container either to Lowe's at the North Vernon, Indiana, warehouse, or to follow any superseding written instructions for delivery that it received from Lowe's customs broker, Fritz. Under COGSA, delivery "occurs when the carrier places the cargo into the custody of whomever is legally entitled to receive it from the carrier." Since Hanjin had a

duty to follow the instructions from Fritz, it could not be liable for the subsequent theft.

The court also reversed the lower court's finding that O'Hare Services and Channel Distribution were not liable, and remanded the matter back for further proceedings to determine if they could be liable under Illinois law as bailees since there was evidence of very lax security precautions.

454) LIABILITY - FAILURE TO COLLECT COD

Question: As a broker, we contracted a truckload carrier to transport a COD shipment. Our load sheet outlined the services requested. The bill of lading ("B/L") states the amount to collect. The driver failed to perform the service, stating someone at the destination claimed that different arrangements were made with the shipper and they no longer required a check at delivery. Our contention is that the carrier should have notified the shipper to confirm such a claim as well as issue a corrected B/L.

What is the carrier's liability for failing to pick up a check at the time of delivery?

Answer: If the bill of lading clearly indicated that the shipment was "COD" and the amount to collect, the carrier's driver should not have delivered it without picking up payment. This would be considered an improper delivery ("misdelivery") and the carrier should be liable for the COD amount if the seller/shipper is unable to collect from his customer.

This subject is covered in *Freight Claims in Plain English* (3rd ed. 1995) at Section 11.31-11.32.

455) LIABILITY – FORKLIFT OPERATOR INJURED WHEN TRUCK MOVES

Question: If a truck driver moves the truck out of the dock with one of our certified forklift drivers still in the process of loading or unloading the trailer and there is an injury, first, who's responsible? Second, is this a workman's compensation claim? Third, who's ultimately responsible for making sure the truck's wheels are chocked? Am I missing anything else here? We have had two near misses in the last month and I want to resolve this as soon as possible.

Answer: Liability for personal injury is based on negligence. From the description you provided, it would seem that the truck driver has a duty to make sure that no one is in the truck or in the way when the truck is moved, and failure to do so would be considered negligence. I would note that both parties could be negligent and in most jurisdictions there is a concept called "comparative negligence" in which the relative negligence of the respective parties is considered in apportioning fault.

An employee injured in the course of his employment is usually covered by Workers Compensation and therefore can't bring a lawsuit for negligence against his own employer. However, the employee could bring a suit against another party if that party was negligent and its negligence caused or contributed to the injury.

456) LIABILITY - FREIGHT FORWARDERS

Question: I would appreciate if you could advise the section of the ICC Termination Act that re-regulates Domestic Freight Forwarders.

We're currently dealing with a 3rd party using a shared shavings scenario and they're claiming to be a Domestic Freight Forwarder. It's interesting to note that in their Service

Agreement they disavow any responsibility for loss or damage, which as you're aware is something that a Freight Forwarder is in fact liable for.

Answer: The ICC Termination Act of 1995 defined the term "Carrier" as "...a motor carrier, a water carrier, and a freight forwarder." (49 U.S.C. 13102)

Thus, any statutory provision in Title 49, Subtitle IV, Part B (which covers motor carriers, water carriers, brokers and freight forwarders) that refers to a "carrier" would also include freight forwarders.

For example, the "Carmack Amendment" provisions in section 14706 include both motor carriers and freight forwarders, with some additional provisions to clarify that a forwarder is considered both the receiving and delivering carrier.

457) LIABILITY – FRONT LOADING CONTAINER

Question: Our organization loaded a container of large paper rolls for export to France. The weight of the trailer was 48,000 pounds and was loaded mostly in the front 67% of the container.

The unit was delivered to the local port, placed on the ocean carrier's vessel, transported to France, unloaded from the ship, and while transporting the unit to the final destination, the trailer overturned, creating extensive damage to the contents and the equipment.

The company that we performed the container loading for now is notifying us of their intent to file a claim for all damages. They say that it was our fault this happened because of the way we front-loaded the unit.

Can you offer suggestions on how to respond?

Answer: I'm assuming that you were not involved as one of the carriers that transported the goods, but only were hired to load the container.

The question is whether your loading was improper, whether this constituted negligence, and whether the negligence was a cause of the damage. If so, you could be liable for the damage.

Obviously, there are factual questions involved, and you might want to consult with an expert in loading and stowing this kind of goods in containers for multimodal transportation.

I would observe that there may be negligence on the part of the motor carrier in France that was transporting the container from the port to the final destination. If so, you may be able to argue that the liability should be apportioned based on the comparative negligence of the respective parties.

458) LIABILITY – INSURANCE AND TERMS OF SALE

Question: In person-to-person online auctions (eBay et al), shipping insurance is generally "optional" and/or at the request of the buyer.

So who is responsible for any subsequent carrier loss or damage when the buyer does not purchase insurance?

Answer: For commercial sales transactions the Uniform Commercial Code establishes certain presumptions about "risk of loss" in transit based on the terms of sale specified in the sales contract. UCC 2-319 provides that where FOB place of shipment is specified, risk of loss passes to the buyer once goods are put in possession of the carrier at origin; where FOB place of destination is specified, risk of loss is on the seller during transit. These presumptions can be varied by the parties in their contract.

If the agreement between the parties is silent as to the terms of sale and/or risk of loss in transit, the usual presumption is that it will be construed as an "FOB place of shipment" contract, i.e., risk of loss would be on the buyer.

I would note that either party would have the right to file a claim for loss or damage with the responsible carrier. As a general rule, common carriers are liable for any loss or damage to goods in their possession, although many carriers do have liability limitations. For example, parcel & express carriers like UPS and FedEx generally limit their liability to $100 per package unless a higher value is declared and an additional charge is paid.

In answer to your question as to who is responsible when no insurance was purchased by the buyer, we must caution you against believing that it would make a difference. The carrier is always primarily liable for any losses incurred in transit. If the buyer purchases insurance, he may file a claim against that insurer, who will usually file a subrogation claim against the carrier.

459) LIABILITY – INSURANCE ISSUES

Question: Have you ever gotten pushback from a carrier about the need for umbrella insurance? We have a truckload carrier questioning the need, and other than standard insurance response (it's necessary to support the carrier's obligations with respect to the liabilities that may occur in performance), I'm wondering if there's a stronger position I should be taking.

Answer: As far as protecting your interests as a shipper, you would be most concerned that the carrier has adequate PI/PD (Auto) coverage.

As a general rule the primary liability for a highway accident is on the authorized carrier, more specifically the operator of the power unit; an owner-operator under a lease may have primary or secondary liability; under certain circumstances and depending on state laws, the owner of the trailer may have vicarious liability.

Normally a shipper would not have liability to third parties for a highway accident. However, a shipper could have liability to the public if (1) it was negligent in loading, blocking, bracing, etc. and its negligence caused or contributed to the accident and the injury, or (2) it was the owner of the trailer, as mentioned above. As an example, shippers have been held liable where they loaded large rolls of steel on a flatbed trailer which came loose in transit and caused accidents. Shippers have also been held liable where they failed to secure cargo which fell over during unloading, injuring a driver.

Even if a shipper has no liability, in the case of a serious accident - especially when the carrier is under-insured or out of business - it is not uncommon for the shipper to be named as an additional defendant (the "deep pocket"), and to incur substantial legal fees to defend the case.

We usually recommend a minimum of $1 million PI/PD (auto) coverage, and that the shipper be named as an additional insured.

As for an "umbrella" policy, most insurers would require the carrier to have both a PI/PD (auto) policy AND a Commercial General Liability policy before issuing the umbrella coverage. This is because they expect the underlying policies to provide the first layer of coverage for a broad range of risks.

While a large carrier with offices and terminals would most likely have a CGL policy, a small operator with only a few trucks might not have this coverage, and therefore would not be able to secure umbrella coverage.

If you feel that the carrier's PI/PD (auto) coverage is not sufficient to protect your interest, then you should either (1) require higher limits on the PI/PD policy - say $2 million, or (2) require the carrier to have a CGL policy - say $1 million, plus umbrella coverage.

I would note that many motor carriers are having financial problems due to the high cost of fuel, insurance, etc. and this issue is coming up quite frequently.

460) LIABILITY – INTERMODAL BLOCKING AND BRACING

Question: When shipping loads via intermodal/piggy back would the obligations to secure the load be the same as if the load were to go over the road? Basically what is the shipper's responsibility versus what the carrier's would be in this situation.

Answer: The standards for proper blocking and bracing depend on whether the trailer/container moves over the road or partly by rail (TOFC/COFC). The rail environment typically involves greater shock, vibration, impact, etc.

Rail carriers will typically decline any claim where it appears that the damage may be due to inadequate blocking or bracing by the shipper. Most railroads have disclaimers of liability in their exempt rail circulars and/or require compliance with their TOFC Loading and Blocking Manual or the Intermodal Loading Guide published by Railinc. (Note: Railinc was formerly a subsidiary of the Association of American Railroads and was spun off by the AAR in 1999).

You can purchase the Intermodal Loading Guide, DP 348, from:

Railinc
7001 Weston Parkway, Suite 200
Cary NC 27513
1-800-544-7245

You can also order through their website: http://www.railinc.com

Railinc also has many other publications dealing with rail transportation of specific commodities.

You can also ask your carriers to send a damage prevention expert to your facility to advise you as to proper loading procedures. (If you follow their advice, it makes it more difficult for them to decline your claims!)

461) LIABILITY – LATE DELIVERY

Question: Our company was asked to pick up a container load of bananas out of the port of Wilmington, Delaware. We were asked to pick up the container on Monday 3/3 to deliver on Wed 3/5 in Detroit which is a 600 mile trip. In this situation we did not have a truck available Monday 3/3 so we planned to pick the load up on Tuesday 3/4. On Tuesday morning 3/4 our truck became unavailable so we called the customer and told them we would not be able to pick up the load and make delivery by Wed 3/5. The customer said they were busy handling another issue and asked our company pick up the load knowing that we would not be able to deliver it until Thursday 3/6. When the load was delivered on 3/6, one-half of the load was rejected. The customer is indicating that we are responsible for the load because it was assigned to us. Can we be held accountable for this claim?

Answer: You have not indicated why the load was partially rejected, so it is difficult to give anything more than some general observations.

As a general rule, common carriers are only required to transport goods with "reasonable dispatch", and this is considered the usual transit time between origin and destination. There is no indication that you exceeded the usual transit time, even though the load was not picked up when originally scheduled.

Frankly, from the facts you have described, I don't see how the carrier could be liable for the partial rejection of the shipment.

Of course, if there was damage to the shipment that occurred in transit, then you certainly could have liability for the damage.

462) LIABILITY – LEAKY HAZMAT DRUMS

Question: As a broker we arranged transportation of a truckload of hazardous drums from Houston, TX going to Long Island City, New York.

Drums were stretched wrapped on pallets but not banded to the pallets. Several drums shifted off the pallets during transit and started leaking. The consignee was the first to notice this at the time of delivery. Shipment was refused and a clean-up company was called in as well as the NYFD for clean up. Both carrier and shipper are claiming they are not at fault. The carrier says it is the shipper's responsibility to package properly and the shipper claims once the carrier pulls away from the dock the carrier is solely responsible.

How do you determine who is legally responsible and what part does a broker play in all of this? Miller Environmental and the NYFD are waiting on their money.

I want to do what is right. Please educate me on what needs to be done.

Answer: The motor carrier has the primary responsibility. First, the carrier should inspect the packaging to ensure that it is adequate, and should not accept a shipment that is not properly packaged. Second, the Federal Motor Carrier Safety Regulations place the duty on the carrier to make sure the cargo is properly secured and to check the load periodically during transit, see, e.g., 49 CFR Section 392.9. Third, it is the carrier's responsibility to comply with all applicable loading and unloading requirements (49 CFR Section 177.800(b)).

It should be noted that the shipper may also have some responsibility also. According to the FMCSA regulations, any person, including a shipper, who loads or unloads hazardous materials on a transport vehicle is performing a "carrier function" and must also comply with the applicable loading and unloading requirements (Section 173.30).

You also ask about a broker's liability. As a general rule, a broker is not responsible for loss or damage in transit, unless the broker was negligent and its negligence caused or contributed to the loss or damage.

463) LIABILITY – LEAVING FREIGHT WITHOUT SIGNATURE

Question: As it pertains to cargo claims, what is the responsibility of the carrier when, at the time of delivery, the consignee is not present to sign the delivery receipt? My customer designs the routes and we are expected to deliver at the appointed window time. However, the majority of these deliveries are made after normal business hours. They continue to pressure me to pay claims that are filed by the consignee after the delivery has been made. My argument is that we do have a clear delivery receipt at the time of delivery (signed by the driver) and the fact that the consignee is not present to sign the delivery receipt should not be held against my company when we are simply delivering to the customer's requirements. At this point it's the consignee's word against the driver's word.

Answer: I find it difficult to believe that a prudent driver would leave freight at a consignee's facility without getting some kind of receipt or acknowledgement of delivery.

It would seem to me that there would have to be someone on the premises to accept a freight delivery and the driver should be able to get that person to sign the delivery receipt. If the person refuses to sign the delivery receipt, I would suggest that the driver make some appropriate record of the name and description of the person and the fact that he refuses to sign.

The other alternative is to refuse to deliver the freight unless someone signs (which would probably get their attention very quickly).

464) LIABILITY – MACHINE FALLING FROM TRAILER

Question: A shipment arrived at the consignee but only one of the two pieces could be off loaded at that destination. The problem was that the consignee did not have a dock, the load weighed almost 7,000 lbs., and it was located in the nose of the 53-foot trailer.

In an effort to resolve the problem, the consignee first tried to move the machine to the rear of the truck on a pallet jack. Realizing that was not going to work, the consignee then asked the driver if he would move down the road to a neighbor of the consignee who had a dock so that the machine could be unloaded.

Driver had no problem with this request and proceeded to move to the other dock. Upon backing in to this dock, which had about a 30 degree downward slope, the machine started to roll from the nose to the back of the truck. When the trailer was about 10 feet away from dock the machine fell off the truck and hit the dock.

Who is responsible for the damage to this equipment? Is the driver responsible for the machine falling out of the truck? Should the driver have made sure that the machine was secure before moving the truck? Or is the consignee responsible because they left the machine on the pallet jack jacked up?

Answer: Federal safety regulations place the burden on the motor carrier to ensure that freight is properly loaded and secured. In other words, the primary responsibility is on the carrier and the driver is required to check the load. See 49 CFR 392.9.

Even if there was some contributory negligence on the part of the consignee, the carrier would still be liable for loss or damage to the shipment. This is because a carrier is liable unless it can establish two things: (1) that the cause of the loss was one of the recognized exceptions to liability (such as the act or default of the shipper or consignee), AND (2) that the carrier was free from any negligence.

I would think that the carrier had a duty to ensure that the shipment was safely secured and that its failure to do so would be evidence of negligence.

465) LIABILITY – MULTIPLE STOP ORDER

Question: We have a four case shortage from one vendor on a multiple pick-up. This carrier had six different vendors in five different locations, all for our company. This shortage happened with the vendor at the fourth pick-up. The driver and the shipper signed the bill of lading, with the loader writing the count next to his name and circling it. The seals were all intact.

With a multiple stop order, which we requested, who is liable for the shortage?

Answer: If the carrier's driver was present to witness and to count the goods as they were loaded and signed for each of the six shipments when they were picked up, I don't see how the carrier can argue that it did not in fact receive the quantity shown on the bills of lading. If so, the carrier assumed liability for their proper delivery and would be responsible for any shortage.

I would note that, from the facts as you have described them, it may be difficult to really determine how or where the shortage occurred. It could be possible that the shortage occurred at one of the vendor locations (e.g. theft by a vendor employee or a third party). In addition, you say "the seals were all intact". On a multiple pickup or drop-off shipment this is somewhat meaningless, since seals could have been applied or broken at any point.

In any event, even if the goods were stolen by someone at one of the stops, the carrier still was responsible to deliver the full quantity that it received.

466) LIABILITY - OVERTURNED TRAILER

Question: We shipped a printing press from southern Illinois to southern Georgia via a flat bed carrier -standard 48' flat bed (not under contract - $100,000 in cargo insurance) on a National Motor Freight Classification ("NMFC") uniform bill of lading ("B/L"). We hired a "rigging" company to load, block and brace and secure the press (also not under contract - verbal agreement only, they submitted their invoice for their services after the loading was completed - it had no terms and conditions or spelled out liability). Someone from our plant in shipping witnessed the loading and signed the B/L.

Outside of Chattanooga, the truck and trailer flipped over while exiting the highway (while on the exit ramp) and destroyed the press. Damage was in excess of $1,000,000 (we had no added cargo insurance on the shipment). Our corporation filed claim against the carrier. The carrier paid our corporation for the loss ($10,000 from the actual carrier and $90,000 from their insurance company).

Our corporation has a "blanket policy" for $26,000,000. We submitted the $900,000 plus dollar balance against our blanket policy and our insurance company paid us for that portion. Our insurance company is now looking to recover its losses from the rigging company (for negligence).

Did the rigger act as an agent of our corporation? What liability, if any, would the rigging company have? What liability would our company have? Could our insurance company come back after us even after they paid the claim?

Answer: Without reviewing your entire file, I can only give you some general answers. 1. The rigging company would probably be considered an independent contractor and, as such, would be liable for its negligence. However, it is not clear whether the loss was caused by the rigger's negligence in loading, blocking, bracing, etc. or was the fault of the motor carrier (or some combination of both).

2. It appears that you have accepted a settlement from the motor carrier and/or its insurer for part of your loss. This would probably preclude any further legal action against the motor carrier, and complicates any lawsuit that might be brought against the rigging company.

3. If your insurance company has paid your company for the loss, it would be highly unlikely that it could come back with a claim against your company, since you are an insured under the policy.

467) LIABILITY - OVERWEIGHT LOAD

Question: I am a traffic manager of a forest products company in Florida. The owner of the company is telling me to load trucks in excess of the legal limits (over 100,000 lbs in some cases). Where does the responsibility lay if or when a driver that is under a signed contract with the company were to have an accident resulting in the worst case scenario death of another individual? Could I be held accountable through the legal process for telling the driver he must load his truck to this capacity?

Answer As discussed in a previous "Q&A", as a general rule the primary liability for a highway accident is on the authorized carrier, more specifically the operator of the power unit; an owner-operator under a lease may have primary or secondary liability; under certain circumstances and depending on state laws, the owner of the trailer may have vicarious liability.

Normally a shipper would not have liability to third parties for a highway accident. However, a shipper could have liability to the public if (1) it was negligent in loading, blocking, bracing, etc. and its negligence caused or contributed to the accident and the injury, or (2) it was the owner of the trailer, as mentioned above. As an example, shippers have been held liable where they loaded large rolls of steel on a flatbed trailer, which came loose in transit and caused accidents.

Shippers have also been held liable where they failed to secure cargo which fell over during unloading, injuring a driver.

I would also note that there are federal regulations issued by the Federal Motor Carrier Safety Administration that govern securement of cargo by motor carriers (they may be found at 49 CFR Part 393). Section 393.118 contains specific requirements for Dressed Lumber and Similar Building Products.

Failure to observe these regulations could be evidence of negligence in the event of a highway accident.

I would certainly think that a shipper could be found liable if it intentionally loaded a truck in excess of the legal limits, and this caused or contributed to injury or death of a third party. Even if it were not ultimately found to be liable, it would most likely be named as a defendant in a lawsuit, and could incur substantial legal expenses for its defense. As the individual instructing the driver to load to the excessive weight, you could be at risk. It is understood that this is a delicate situation, as your boss (the owner) has instructed you to do this. It is also understood that your boss is not likely to memorialize these instructions in writing in light of the legality of the situation.

468) LIABILITY – OVERWEIGHT SHIPMENT

Question: I have a question concerning bulk shipments that are over the legal 80,000 lbs gross weight. If a truck arrives at the consignee with a gross weight of over 80,000 lbs., what actions does the consignee need to take? Can the consignee reject the load and require the carrier to deliver the overloaded cargo back to the shipper? Or, since the truck has already arrived at the consignee, is the consignee responsible for any damaged caused by the overloaded trailer back to the shipper.

Is the consignee required to unload the trailer? If so who is responsible for any damage done to personnel or equipment caused by the fact the truck was overloaded?

What responsibility does the carrier have for hauling material in excess of the legal weight?

Does it depend whether the freight was shipped FOB Destination or FOB Shipping Point?

Is the consignee responsible for any damaged caused, due to the fact the trailer was overloaded, while the cargo was in transit to the consignee?

Does it matter if the material was shipped FOB Destination or FOB Shipping Point?

The material is scrap metal for recycling purposes. If the consignee was to reject the overloaded container and return the load to the shipper, would the consignee be responsible for any fines that may apply? Or, would the shipper still resume all responsibility?

Answer: I'm not sure I can answer your questions without knowing what kind of damage or injuries you are concerned about.

As a general rule, a carrier is responsible for the operation of its vehicle and should not accept or transport an overweight shipment.

Liability for personal injury and property damage is based on negligence. If the consignee's employee is injured during unloading, he will normally be covered by worker's compensation and cannot sue his employer. However, if the injury is caused in whole or in part by the negligence of the shipper or the carrier, he may have an action against those parties.

The question of negligence would not ordinarily be affected by the ownership of the cargo (FOB terms).

If a truck is so seriously overloaded that it would be unsafe for the consignee to unload the cargo, I would suggest that the consignee should refuse to unload it, but should promptly notify the shipper and request instructions.

If the carrier was subject to overweight fines, it would probably look to the original shipper for reimbursement.

469) LIABILITY - REASONABLE DISPATCH; ON-HAND NOTIFICATION

Question: We hauled a load of produce for a broker. The load was to pick up on Monday and deliver on Friday. The truck broke down in Santa Rosa, NM. We found the part but the dealer was unable to get the part to us due to I-40 being closed due to ice. We finally got repaired the next afternoon.

The broker was informed all the way as to the weather and breakdown. When we arrived on Saturday at approximately 1pm the location was closed and would not reopen until Monday. The broker told us that they would not take load due to late arrival and that we owned the load. What recourse do we have if any?

Answer: Ordinarily, a motor carrier is only required to deliver with "reasonable dispatch". However, it appears that you may have agreed to a specific time for delivery, in which case it could be a breach of the contract of carriage.

First, you should see if you can work something out with the broker, the shipper or the consignee to deliver the produce.

If this fails, in the case of perishables, it is important to act quickly to mitigate the damages. You should send a formal WRITTEN "on-hand notice" to the broker, the shipper and the consignee requesting disposition instructions, and advising that you will place the shipment in a public cold storage facility, and that if necessary you will sell the produce to mitigate the loss and to cover your freight charges and expenses.

470) LIABILITY – SHIPMENT REFUSED WHEN NOT SEALED

Question: An independent warehouse hired by my customer loads a truck and is instructed by the customer to seal the truck and write the seal number on the bill of lading. I also instructed the carrier verbally and in writing that the truck had to be sealed or the shipment would be refused. When the truck was loaded the carrier was handed the paperwork and the seal. The warehouse did not seal the truck. They left it up to the driver to put the seal on. When the carrier arrived at the receiver the whole shipment was refused because it was not sealed. Who is at fault for the refused shipment; the warehouse or the carrier?

Answer: There are a number of issues here.

First, the customer apparently gave its warehouseman instructions that were not followed, resulting in the shipment being rejected by the consignee. This is an issue between the customer and the warehouseman, and the warehouseman could be liable to the customer for any costs or expenses if it violated their contractual agreement.

Second, you indicate that you gave instructions to the trucker to seal the truck and that he did not do so. If your instructions were clear and unequivocal, and you told the trucker that the shipment would be refused if there was no seal, this would constitute the kind of notice that is sufficient to result in carrier liability for "special damages", see *Freight Claims in Plain English* (3rd Ed. 1995) at Section 7.3.

Third, there is a question as to whether the consignee should have accepted the load instead of refusing it. The carrier will undoubtedly argue that the consignee had a duty to "mitigate the loss", i.e., that the mere absence of a seal is not a sufficient reason for rejecting a shipment, and the consignee probably should have at least inspected the shipment to see if there was any damage or shortage.

471) LIABILITY - THIRD PARTY HAZMAT SHIPMENTS

Question: We are a producer/shipper of water treatment chemicals, most of which are Hazmat. Some customers resell our products for direct shipment from our shipping locations to

their customer but wish to conceal the identity of our company for obvious reasons. Thus we are asked to make “Blind” shipments showing our customer as the shipper at our address and their customer as the consignee. For commercial reasons, our company prepares the bill of lading (“B/L”) and I am concerned that by showing incorrect information on the B/L, namely the incorrect shipper’s name, we inherit some liability. No one seems to share my opinion. Do you see anything wrong with this scenario?

Answer: The arrangement you describe is not unusual, and it is not “illegal” or improper.

Assuming that you sell your product to your customer “FOB Origin”, the customer essentially would take title at your door. Thus the customer could be considered the shipper and beneficial owner of the product, and you would merely be acting as the customer's agent in tendering the product to the carrier.

Now, as for liability, if the product is “HazMat”, normally it is the shipper that is required to comply with the regulations as to manifests, placarding, bill of lading notifications, etc. I suppose you could have some liability as the “real” shipper for failure to comply with the regulations, even if your customer is shown as the shipper on the bill of lading. You should review the HazMat rules and regulations thoroughly regarding this, as violations can result in very severe penalties (visit the Office of Hazardous Materials Safety online at http://hazmat.dot.gov/training/training.htm for training and other information).

Lastly, I don’t think it makes any difference whether the carrier is a “common” or “contract” carrier, since the statutory distinction between common and contract carriers was eliminated by the ICC Termination Act of 1995.

472) LIABILITY – USE AND COST OF LUMPERS

Question: We are a transportation broker. One of our customers that uses our services requires that their vendors load all of their shipments (SL&C) and if necessary to hire “lumpers” to perform this task. When a lumper is required, the lumper is then paid by the shipper. Our question is, would the lumper be considered an agent of the shipper or the consignee?

In either instance, the motor carrier would not be responsible for shortages if not present at the time of loading.

Answer: There is a provision in the Interstate Commerce Act that deals with “lumpers”, but it does not specifically answer your question (see below).

> 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.

In any event, it would seem to me that if the shipper or receiver required the hiring of a lumper, the lumper would be their agent.

473) LIABILITY – USE OF WAREHOUSE SERVICES

Question: We are a broker. Our customer has asked us to arrange for warehouse storage of his product. We have located the perfect building and it meets his/our requirements. However, the owner of the facility does not wish to provide liability or contents coverage. Questions:

1. In the event of damage, theft, loss to the stored cargo in his warehouse, who would be liable?
2. In the event that a sprinkler inadvertently damaged stored cargo, who would be liable?
3. If not, how can I get insurance on a building that I don't own nor on cargo that I don't own?
4. Will my contingent cargo cover stored merchandise? It is not a broad policy.
5. The owner is demanding that I purchase a liability policy for my personnel in his warehouse. Will a General Liability policy cover this?

Answer: Let me try to answer your questions.

1 & 2. The warehouseman is the owner/operator of the warehouse. The warehouseman has legal custody of the goods as a bailee for hire and is responsible for the use of ordinary care in protecting the goods of others that are in his custody and control.

A warehouseman is legally liable for loss or damage to goods in its possession where the loss or damage is caused by its negligence. The claimant (bailor or owner) has the burden of proving negligence. Most warehousemen have liability limitations in their warehouse receipts that limit their liability to a certain amount ($ per lb., etc.). Warehousemen usually have insurance for goods in storage, but their insurance policies have deductibles, exceptions, exclusions, etc. Without looking at the warehouse's insurance policy, I could not tell you what risks would be covered. At the very least, you should demand that the warehouse tell you what their liability provisions are and what kind of insurance they have. You should also have a written agreement with them that covers these matters.

3. Since you are not the owner (or the actual bailor or bailee) of the goods, you probably don't have an insurable interest. The owner, of course, would have an insurable interest and can purchase inland marine or transit insurance that would cover its goods while in transit or temporary storage.

4. Without reviewing your contingent cargo policy, I would seriously doubt that it would cover you for a loss while the goods are in storage in a warehouse.

5. It is possible that a general liability policy would cover your exposure for any injury or damage caused by the negligence of your employees at an off-site location, but you would have to check with your agent or broker.

I would note that the liability of warehousemen is discussed in detail in *Freight Claims in Plain English* (3rd ed. 1995) at Section 14.0.

474) LIABILITY - WAREHOUSE LIMITATIONS

Question: I am looking for information about the liability of 3PL warehouses for damage. Do you know how much they can limit their liability? How high can the buyer firm negotiate it? Is it ever as high as "full liability"? What is the norm?

The president of WERC says that it is common to limit it to only the per package storage/handling charge. Is this true? I'm trying to advise a client who has contracted out most

of its warehousing to a bunch of cowboys on squeeze trucks during a recent round of supposed cost-cutting.

Answer: Warehousemen can limit their liability under the Uniform Commercial Code ("UCC"), so long as the limitation is "reasonable" and there is a choice of rates, i.e., the opportunity to declare a higher value and pay an additional charge. The limitation can be in a warehouse receipt or in a separate written agreement.

A typical warehouse receipt might have a limitation of "30 cents per pound, per article", or $2,000 for the entire storage lot. Valuation charges are usually stated in terms of "XXX per $100 per month".

This, of course, may be unacceptable for your client, and there is no reason why a different liability limitation cannot be negotiated and made part of the agreement.

Normally warehousemen do not provide insurance for the benefit of the bailor, but this again is negotiable.

Note that a warehouseman's liability is based on negligence (not the same as a common carrier), so that if there is loss or damage, the owner has the burden of proving that it was caused by the warehouseman's negligence.

475) LIABILITY – WHEN DOES CARRIER LIABILITY BEGIN?

Question: This question is specific to possession of goods at the time of a driver signing the bill-of-lading ("B/L"). When does the driver/carrier legally take possession of the load? Is it when the goods are physically loaded or when the B/L is signed?

Answer: Normally the liability of a motor carrier begins when it has actually received physical possession of the shipment, i.e., when it is loaded onto the truck.

However, there are at least two court decisions where a trailer was loaded and the driver signed the bill of lading, but did not remove the trailer (intending to come back later to pick it up), and the trailer was stolen from the shipper's premises. In those cases the court concluded that the carrier was liable since it had actual or constructive possession of the goods, see *Conair Corp. v. Old Dominion Freight Line, Ind.*, 22 F.3d 529 (3rd Cir. 1994) and *Mattel Inc. v. Interstate Contract Carrier Corp.*, 722 F.2d 17 (2nd Cir. 1983).

I would note that this subject is covered in *Freight Claims in Plain English* (3rd Ed. 1995) at Section 3.0, Beginning and Ending of Carrier Liability.

476) LIABILITY - WHEN IS IT MINE?

Question: I order material, such as intermodal containers of olives, from California. I arrange for a carrier to pickup the intermodal trailer and direct them to a final destination, such as Indianapolis, to deliver to a 3rd party warehouse partner that distributes our package goods.

At what point in this process are these olives, or other goods, legally mine? Are they mine when they are released from the shipper? Are they mine while in transit or are they the property of the carrier handling the particular move until signed for by warehouse? Are they ours legally when received and released from the carrier to our warehouse?

The question relates to tax issues, particularly, when are the goods legally inventory?

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 once goods are put in possession of the carrier at origin; where FOB place of destination is specified, risk of loss is on the seller during transit, etc. UCC 2- 320 covers CIF and C&F terms.

The use of these terms in a purchase order results in a legal presumption as to where title (the "right to possession" in UCC language) passes from the seller to the buyer. This is a presumption which the parties may change by contract, i.e., agree to a different place or event for the passing of title.

If the agreement between the parties is silent as to the terms of sale and/or risk of loss in transit, the usual presumption is that it will be construed as an "FOB place of shipment" contract, i.e., risk of loss would be on the buyer.

I would note that the motor carrier never has "title" to the goods during transit; its role is as a common carrier and/or bailee for hire.

477) LIABILITY FOR FINES – SHIPPER OR CARRIER

Question: We are a freight brokerage and we have a customer who shipped a full truckload of wire on spools through us. We brokered this load out to one of our regular dry van carriers. The wire was oiled heavily, according to purchase order specifications. During transit, oil dripped down off of the wire spools onto the floor of the trailer and the spools shifted to the front, even though there was a strap placed in the trailer by the driver to secure the load.

The driver first discovered the load had shifted when he stopped at a DMV/DOT Scale in Virginia and was fined $1847.00 for the load being 9,000 lbs over on the drive-axle, because the wire spools shifted forward. He also had to pay $300.00 for the wire spools to be reconfigured on the trailer.

The overweight fine was paid by the trucking company and submitted to the shipper for reimbursement, but the shipper wants to see some shared responsibility in the fine. As a broker I know we are not responsible in any way, but does the driver or the trucking company hold any responsibility or does it all fall on the shipper?

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.

There are some court decisions that say a shipper may be liable to a carrier for improper packaging, blocking, bracing, etc. where it causes damage to other shipments or to the carrier's equipment. I suppose it could be argued that the heavy oiling caused or contributed to the load shift (and the consequential overweight fine), but it sounds to me that the carrier's driver should have made sure that the coils were better secured.

478) LOADING AND UNLOADING FREIGHT

Question: Who is responsible for the unloading of material from a flatbed or van on a truckload (as opposed to less than truckload) shipment, the driver or consignee?

Answer: There is no single answer to your question.

If the shipment moves under a Uniform Straight Bill of Lading that incorporates the National Motor Freight Classification ("NMFC"), then Item 568 of the Classification (NMFC 100 series) will apply. That Item provides:

> Item 568
> HEAVY OR BULKY FREIGHT--LOADING OR UNLOADING
> Unless otherwise provided in carriers' individual tariffs, when freight (per package or piece) in a single container, or secured to pallets, platforms or lift truck skids, or in any other authorized form of shipment:

(a) weighs 110 pounds or less, the carrier will perform the loading and unloading;

(b) weighs more than 110 pounds but less than 500 pounds:

(1) The carrier will perform the loading and unloading where the consignor or consignee provides a dock, platform or ramp directly accessible to the carrier's vehicle except when the freight exceeds 8 feet in its greatest dimension or exceeds 4 feet in each of its greatest and intermediate dimensions--See paragraphs (b)(2) and (d). Where the consignor or consignee does not provide a dock, platform or ramp, the truck driver, on request, will assist the consignor or consignee in loading or unloading.

(2) The carrier will perform the loading and unloading where the consignor or consignee provides a dock, platform or ramp directly accessible to the carrier's vehicle if such freight: (1) exceeds 8 feet but does not exceed 22 feet in its greatest dimension and does not exceed 2 feet in its intermediate dimension, or (2) does not exceed 10 feet in its greatest dimension and does not exceed 5 feet in its intermediate dimension and does not exceed 1 foot in its least dimension. Where the consignor or consignee does not provide a dock, platform or ramp, the truck driver, on request, will assist the consignor or consignee in loading or unloading.

(c) weighs 500 pounds or more, the consignor will perform the loading and the consignee will perform the unloading. On request of consignor or consignee, the truck driver will assist the consignor or the consignee in loading or unloading.

(d) exceeds 8 feet in its greatest dimension or exceeds 4 feet in each of its greatest and intermediate dimensions, the consignor will perform the loading and the consignee will perform the unloading. On request of consignor or consignee, the truck driver will assist the consignor or consignee in loading or unloading. The provisions of this paragraph will not apply to the extent provisions are published in paragraph (b)(2) of this Item.

If the NMFC is not applicable, then it depends on the contract between the shipper and the carrier and which party has agreed to provide the loading and unloading service.

The "agreement" can be in a written transportation contract, or it can be incorporated through the bill of lading in the carrier's individually-published tariff. If there is no written agreement, then a court would usually say that it depends on the custom and usage of the trade.

479) Measure of Damages – Carrier Contaminates Product

Question: We recently had a bulk delivery in a 3 compartmented tank delivered to one customer. The carrier was given specific instructions on which product was in each compartment and the paperwork issued by the shipper was correct. The manifest issued by the carrier gave no indication that this was a compartmented load, nor that more than one product was loaded on the truck. The driver arrived at consignee, hooked his hoses up to the front compartment, while the consignee hooked the hoses up to the storage tank. As it turned out approx. 5000 lbs. of the wrong product was loaded into the storage tank. This caused approx. 10000 lbs. of product to be contaminated and a complete unloading system ruined. We have filed a claim with the carrier for the cost of the product, replacing 2 storage tanks, etc. They are willing to accept 1/3 of the costs with the shipper and consignee splitting the other. Our position is that the paperwork issued to the carrier was correct and matched verbal instructions and we feel the carrier is 100% responsible.

Answer: You have not furnished the shipping documents, bill of lading, etc. or the details as to the loading and unloading of the product, so I can only give you a general answer.

From your description of the facts, it would appear that the carrier is liable for the misdelivery of the product. As to the consequential damages, it would seem that the contamination and other damage to the equipment would be foreseeable, and therefore recoverable. If so, the one-third offer should be rejected.

480) MEASURE OF DAMAGES – CONCEALED DAMAGE

Question: Can you please explain to me how the 1/3 rule for concealed freight damage came about?

Answer: There is no "one-third rule". 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.

I would point out that carriers have a duty to investigate all claims, and to make reasonable efforts to determine the cause and/or place of the loss, see 49 CFR Part 370.

481) MEASURE OF DAMAGES – COST OF QUALITY INSPECTION

Question: A load was shipped from North Carolina to California. There was a traffic accident en route to the destination. The carrier was able to take it to the destination, which was our cold storage. We need to inspect the product for temperature issues (QA inspection), but our nearest QA inspector for the product is in Chicago. We plan on filing a claim for lost product.

My question is--would we be able to recoup funds from the carrier for the QA inspector's travel?

Answer: As a general rule, reasonable expenses incurred in mitigating a loss are recoverable in a claim for loss or damage to goods in transit. Thus, if the quality inspection of this product is for the purpose of determining if there can be any salvage, the expense should be recoverable.

I would suggest, however, that you discuss this with the carrier and let them know your intentions. They may have some other suggestions.

482) MEASURE OF DAMAGES – COST OF REPLACEMENT SHIPMENT

Question: I had made arrangement to deliver catalogs to an EXPO in Las Vegas, Nevada. I was upfront with the carrier from the time the job was quoted that it must arrive 1/13/03. I gave him the proper address, phone number, delivery hours in writing prior to delivery and typed "delivery must be made on 1/13/03, driver must check in at show site before 3:30pm on 1/13/03" on the Bill of Lading (B/L). I was told a pickup made on 1/8 would arrive on 1/13.

On 1/13/03 I called carrier to confirm delivery and was told it would be on time; the next morning I was told delivery was made, ("because he was well on his way to his subsequent deliveries") but carrier could not produce a delivery signature. That evening carrier could not locate driver, so on 1/14/03, in the evening I sent a few cartons of catalogs overnight to my client in Las Vegas so he would have something for his booth at the EXPO. The carrier finally delivered the catalogs on 1/15/03.

I incurred $409.00 in overnight charges, so my client would have materials. Can I deduct this from the freight bill? Does the law require me to pay the freight bill in full prior to submitting a claim?

Answer: Normally the expense of sending a replacement by express or air for a delayed shipment would be considered "special damages" and not recoverable from the carrier, see *Freight Claims in Plain English* (3rd ed. 1995) at Section 7.3.2. Under the circumstances you have described, I think these charges may be recoverable because (1) you gave express instructions as to the need for specific delivery and (2) it would be reasonably foreseeable that you would have to ship a replacement if the goods were delayed.

As to your other question, there is no law or regulation that says you can't deduct your claim from the carrier's freight charges or that you must pay the freight bill in full prior to submitting a claim.

483) MEASURE OF DAMAGES – DISPLAY PACKAGING

Question: My company is a third party logistics provider. Our customer manufactures and ships electronics to retail stores. If a product arrives with damage to the boxes (packaging that the product is displayed and sold in at the retailer) such that the retailer does not believe the product will sell, he rejects the product.

The carrier is under contract for full actual loss of invoice price.

Our issue is with damage done to the box that the electronic product is sold in. If the product inside the box is damaged the carrier will pay the cost of the claim which includes the cost of the box. If the product inside is not damaged they will not pay for the cost of the new packaging.

The original carrier denial was that the packaging was not part of the claim. We refuted that this packaging was part of the cost of the claim because the product was sold in it and it contained information about the product.

Now they have stated their defense as:

Act or default of shipper - improper packaging. If the shipper wishes to claim that the box is a display case, then box and the product inside are both goods which need to be protected from ordinary shipping and handling. As a result, the display case will need to be protected according to the NMFC packaging items. In this case, there was little or no protection afforded to the “display cases,” as they were essentially traveling unpackaged.

Clearly these boxes are not display cases. In my opinion the manufacturer is mitigating the carrier’s loss by just charging for the boxes. They may have a defense about the packaging but they have not offered any proof that the packaging was the sole reason for the damage.

What is your recommended defense based on the general information I have given you?

Answer: Consumer products often have packaging that displays the item and contains advertising or other information for prospective purchasers. When the packaging has visible damage, it may be difficult or impossible to sell the item, even as distressed merchandise. This is especially true with electrical and electronic devices if there is a question about internal damage or possible malfunction and/or a concern about warranty or product liability exposure. Furthermore, the retail store may not have the facilities to inspect, test and/or repackage damaged goods.

The parties do have an obligation to mitigate the loss. Obviously, you should discuss the matter with the consignees and ask them not to reject items with minor cosmetic damage to the packaging. It may also be possible to return the items back to the manufacturer for refurbishing or repackaging, and thereby mitigate the loss.

Whether the carrier is liable when the damage is only to the packaging is a difficult question. If the carrier knows how the goods are packaged and that damage to the package may make the goods unsaleable, it should either refuse to accept the shipment or take responsibility for the damage.

As far as denying a specific claim, it is not enough to merely say that the packaging is inadequate for the normal transportation environment; the carrier also has the burden of establishing that it was free from negligence in handling the shipment.

Lastly, you mentioned that this carrier is “under contract”. A properly drafted transportation agreement should have addressed this issue.

484) MEASURE OF DAMAGES – USED MACHINERY

Question: As a manufacturing company, we move production equipment from site to site, via truckload and less-than-truckload carriers. This equipment is used, and can be shipped from a manufacturing facility or a storage facility. As this equipment is custom-made for our company, we do not want to allow the carrier to limit liability to a low maximum value (i.e. $1.00 / lb).

Should I refer to market or replacement value? If so, how do I respond to the carrier's claim that they have no proof that this equipment was operational when shipped, and therefore do not want to be liable for non-working equipment upon delivery (i.e. repair costs)?

Answer: First, you should understand that many carriers have tariff provisions that limit liability on "used machinery" - often to values as low as 10 cents per pound. If you ship with one of these carriers and use a Uniform Straight Bill of Lading or equivalent, you may be incorporating by reference the terms and conditions of their tariffs - and the liability limitations.

The way to avoid this is to negotiate a written transportation contract with each of the carriers, and to specify what liability provisions will be applicable. You will be charged higher rates depending on the value declared.

As to the burden of proof, the claimant always has to establish that the shipment was in good condition at origin and was damaged at destination, and the amount of its damages. These are factual questions that have to be established by competent evidence and by persons having actual knowledge.

485) MOTOR CARRIERS – INTRASTATE AUTHORITY

Question: Is it still necessary to have a certificate for intrastate authority?

Answer: The federal requirement is that any for-hire motor carrier must have operating authority from the Federal Motor Carrier Safety Administration, and must comply with applicable regulations such as insurance, registered agents for service of process, etc.

Following the ICC Termination Act of 1995, the states no longer have authority to regulate the rates, services and practices of motor carriers ("economic regulation").

However, many states still have a requirement that carriers "register" with the state or obtain intrastate operating authority. You have to check with the individual state department of transportation or applicable regulatory agency.

486) OFFSETTING CLAIMS AGAINST FREIGHT CHARGES

Question: I hauled load for a broker, which has a possible claim due to high temperatures. The broker has stopped payment on my past due invoices. Can a broker hold payments due for past loads simply because there is claim pending for the current load?

Answer: There is no law or regulation that says a broker can't hold payments if there is a claim pending.

If the broker refuses to pay your freight charges, you probably will need to retain an attorney and bring a suit to collect the amount due. You should be aware, however, that the defendant might assert a counterclaim for the loss/damage claim.

487) Operating Authority - Motor Carriers and Brokers

Question: I have a couple of questions regarding a trucking company that I cannot get clear even after looking at the Federal Motor Carrier Safety Administration ("FMCSA") Rules and Regulations.

If a trucking company has different divisions, for example a truckload operation, a brokerage operation, container operations and an less-than-truckload ("LTL") operating carrier, do they have to register each operation as a separate operation or can they operate different divisions under one authority?

Also, when a company bills you on freight bills that reflect a name and MC number of a carrier who has had their authority revoked for three years are you obligated to pay the bill and is the carrier within their rights to use these old bills?

The final question is a carrier is holding a shipment for hostage due to a dispute over claims and held payments. Can they hold a shipment for hostage? In this case the shipper moved freight with the carrier and they lost the shipments or in some cases damaged them and will not return the products to the manufacturer for inspection. In all cases the freight is so old that the manufacturer can no longer resell the products. In most of the cases, there are a number of claims, but the carrier did not acknowledge the claims except in telephone calls with the shipper.

Answer: 1. Motor carriers (whether TL or LTL) and brokers must register with the FMCSA and obtain authority to operate. The FMCSA presently allows a company to have both kinds of operating authority under the same legal entity and with the same MC number.

However, it is not a good practice to do this. The legal responsibility and liability of a motor carrier and a broker are different. If you do not clearly identify "what hat you are wearing" when dealing with a shipper, it can lead to serious problems and litigation in the event of cargo loss & damage or accidents involving personal injury or property damage. In addition, many insurance companies will no longer issue policies to a company that has both motor carrier and broker operations.

I would strongly recommend that motor carrier and broker operations be separated, with different names (and preferably separate corporations or divisions). All rate quotations, invoices, bills of lading and related documents should clearly indicate whether they are for motor carrier or broker services.

2. The statute of limitations for a motor carrier to bring suit to collect freight charges is 18 months (49 U.S.C. Section 14705). This would apply whether or not the carrier is still operating or has had its operating authority revoked.

3. A motor carrier has what is known as a carrier's lien, which means that it can hold freight in its possession until the freight charges on that particular shipment are paid. If the shipper or owner tenders payment of the freight charges the carrier must deliver or release the shipment, or it will be guilty of conversion.

488) Overweight Fines – Liability

Question: Our company sold some heavy die-molds for the making of plastic toys, terms FOB our dock. The truck was not over load on gross but was overweight on axle. Who is responsible for the fine, and the cost to readjust the load?

Answer: Without knowing more of the details or your contract with the carrier, I can only give you a general answer.

I suppose the carrier might try to seek reimbursement from the shipper for overweight fines, if the shipper improperly loaded the truck. However, it is the carrier that is primarily responsible for the proper loading of the truck, and is responsible for complying with the highway weight laws.

I cannot see how a consignee could be liable, even if the terms of sale are “FOB Origin”.

489) OWNER-OPERATORS - CARRIER LIABILITY

Question: I was told that Department of Transportation regulations require that a carrier who enters into an agreement with an independent contractor for trucking services must lease and sign a receipt for the contractor’s equipment. What happens if the contractor, while not under the carrier’s dispatch, gets into an accident during the term of the equipment lease for which the contractor is deemed negligent? Does the carrier have exposure? If so, my concern is whether or not the carrier’s insurance company will defend and/ or provide coverage under the trucker’s endorsement?

Answer: The federal regulations governing leasing and owner-operators are found in 49 CFR Part 376, Lease and Interchange of Vehicles. These regulations require the leased vehicle to display the name and DOT number of the authorized carrier, and make the authorized carrier responsible for the operation of the leased vehicle, including liability to the public in the event of highway accidents.

A line of court decisions had developed over the years that attorneys refer to as the “logo liability” cases. In practical terms, federal courts applying the doctrine used it to hold the party whose logo or placard appears on the side of a tractor liable for whatever damage that truck causes, regardless of who was driving and whether the truck was or was not under lease. See *Acceptance Ins. Co. v. Canter*, 927 F.2d 1026 (8th. Cir. 1991); *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983); *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973). More recently however, though a few courts continue to apply the doctrine of logo liability, newer cases have recognized that a change in regulations governing motor carriers made in 1986 by the Interstate Commerce Commission (“ICC”) abrogated the doctrine of strict logo liability, see *Knight v. Swift Transportation Co., Inc.*, Civil Action No. 1:05-CV-1060 (N.D.Ga. Jul. 31, 2006). In the *Knight* case, the court held that, under Georgia law, Swift was not liable merely because its name (“logo”) was on the trailer that was involved in the accident.

The “bottom line” is that an authorized carrier still does have exposure to liability (and will probably be sued) if its placard is on the tractor and an owner-operator is involved in an accident. This would be true even if the owner-operator were on some private venture of his own and is not actually working for the authorized carrier at the time.

Our advice is to become familiar with the federal regulations and make sure that your lease is in compliance with the regulations. When the lease is terminated, or the owner-operator is not working for the authorized motor carrier, remove the placard or other identification.

As for insurance, without reviewing your policy, I would think that if it covers owned and leased vehicles (and/or specifically lists the owner-operator’s tractor), the insurance should be applicable and the insurer should be required to defend claims or suits.

490) PROOF OF DELIVERY

Question: I have a shipper who demands a proof of delivery on her shipments, not a big deal. However, these truckloads are being delivered to construction sites for new store openings. Although the bill of lading has a requested time and date on it, the construction site employee signed for the product and did not date it. My shipper wants more proof. I maintain that no exceptions noted on the bill of lading is proof that the transaction was completed at the proper time. Is there any legal description of proof of delivery, and is a date needed to authenticate?

Answer: There is no "legal" definition of a proof of delivery ("POD"), nor is there any federal regulation that governs the form and content of a POD. A POD can be a notation on the bill of lading, or it can be a separate document that is signed by the consignee.

Certainly it is good practice to include certain basic information on any document that is used as a POD: the name of the consignee, the name (printed) and signature of the person acknowledging receipt at destination, the date and time, and any exceptions as to damage or shortage.

In your case, if the consignee did not date the POD, you may be able to establish when the shipment was delivered from the carrier's records or with a statement from the driver.

491) RAIL FREIGHT CHARGES – STATUTE OF LIMITATIONS

Question: What is the statute of limitations on rail carriers billing customers for incidental/intra-terminal switching charges?

Answer: 49 U.S.C. Section 11705 (a) states:

> (a) A rail carrier providing transportation or service subject to the jurisdiction of the Board [STB] under this part must bring a civil action to recover charges for transportation or service provided by the carrier within 3 years after the claim accrues.

Subsection (g) provides that the claim accrues "on delivery or tender of delivery by the rail carrier".

492) RECORD RETENTION - BILLS OF LADING & POD'S

Question: My question probably has a simple answer; but sometimes when it seems simple, it's really not. Therefore I thought I would ask you for clarification.

We are a transportation broker and provide broker services to our customers. With regard to record retention, we are aware that we should be keeping records for a minimum of three years. My question pertains to the original bill of lading ("B/L") and proof of delivery ("POD"). As a broker, am I required to keep this original copy? Am I required to give it to my customer when I am invoicing them? Or, can my brokered carrier hold the original and provide me a certified copy of that original for my records?

Is there anything that states who is the holder of the "original" document?

Answer: The federal requirements governing record retention are found in the 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, 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 B/L or POD 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).

The regulations do not address your specific question as to which party should retain the "original", although I would note that many shipper transportation contracts do specify that the original bill of lading or proof of delivery must be furnished as a condition of payment.

Unless there is some contractual obligation, I would think that, since the motor carrier could be liable for loss or damage claims, it would be the most logical party to retain the original proof of delivery.

SALVAGE - HOLDING DAMAGED FREIGHT

Question: If damage liability has been accepted by the carrier and is documented by email, how long is the consignee required to hold the damaged freight after the carrier has requested to pick up for salvage?

Answer: Assuming that you are dealing with a carrier that is a participant in the National Motor Freight Classification, 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 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.

493) REFUSED SHIPMENT – ON HAND NOTICE

Question: The consignee refused a shipment and the shipper will not take it back. We, as the broker, issued an on hand notice. How much time do you give the shipper to respond to the on hand notice? How much time do you give the shipper to pay the freight charges?

Answer: 1. The carrier (not the broker) should issue the on-hand notice in the event the shipment is refused by the consignee.

2. If the consignee refuses a shipment, the procedures for notification, storage charges, public sale, etc. are governed by Section 4 of the terms and conditions of the Uniform Straight Bill of Lading (which you can find in the National Motor Freight Classification). In some states, there may also be relevant provisions in the Uniform Commercial Code.

3. The shipper’s obligation to pay the freight charges depends on your contractual agreement with the shipper and the credit terms that you have established.

494) SHIPPERS' LOAD AND COUNT

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

Answer: "SHIPPERS LOAD AND COUNT" NOTATIONS

The notation "shippers load and count" ("SL&C") on a bill of lading is generally used when, for the shipper's convenience, the carrier "drops" a trailer or container to be loaded and sealed by the shipper, and returns at a later time to pick up the trailer or container without inspecting or counting the contents.

The Bills of Lading Act (49 U.S.C. § 80113) addresses the effect of loading by the carrier or the shipper. The relevant language reads as follows:

> § 80113. Liability for nonreceipt, misdescription, and improper loading
>
> (a) Liability for nonreceipt and misdescription. -
>
> Except as provided in this section, a common carrier issuing a bill of lading is liable for damages caused by nonreceipt by the carrier of any part of the goods by the date shown in the bill or by failure of the goods to correspond with the description contained in the bill. The carrier is liable to the owner of goods transported under a nonnegotiable bill (subject to the right of stoppage in transit) or to the holder of a negotiable bill if the owner or holder gave value in good faith relying on the description of the goods in the bill or on the shipment being made on the date shown in the bill.
>
> (b) Nonliability of carriers. -
>
> A common carrier issuing a bill of lading is not liable under subsection (a) of this section -
>
> (1) when the goods are loaded by the shipper;
>
> (2) when the bill -
>
> (A) describes the goods in terms of marks or labels, or in a statement about kind, quantity, or condition; or
>
> (B) is qualified by "contents or condition of contents of packages unknown", "said to contain", "shipper's weight, load, and count", or words of the same meaning; and
>
> (3) to the extent the carrier does not know whether any part of the goods were received or conform to the description.
>
> (c) Liability for improper loading. -
>
> A common carrier issuing a bill of lading is not liable for damages caused by improper loading if -
>
> (1) the shipper loads the goods; and
>
> (2) the bill contains the words "shipper's weight, load, and count", or words of the same meaning indicating the shipper loaded the goods.
>
> (d) Carrier's duty to determine kind, quantity, and number -
>
> (1) When bulk freight is loaded by a shipper that makes available to the common carrier adequate facilities for weighing the freight, the carrier must determine the kind and quantity of the freight within a reasonable time after receiving the written request of the shipper to make the determination. In that situation, inserting the words "shipper's weight" or words of the same meaning in the bill of lading has no effect.
>
> (2) When goods are loaded by a common carrier, the carrier must count the packages of goods, if package freight, and determine the kind and quantity, if bulk freight. In that situation, inserting in the bill of lading or in a notice, receipt, contract, rule, or tariff, the words "shipper's weight, load, and count" or words indicating that the shipper described and loaded the goods, has no effect except for freight concealed by packages.

When "SL&C" is inserted on a bill of lading, it essentially creates a rebuttable presumption that the shipper has loaded and counted the shipment, and that the carrier has no knowledge of

the condition of the goods or the number of packages or items in the shipment. It can have significant legal effect upon the carrier's liability, especially in the case of shortages which may be discovered at destination. For a discussion of the shipper's burden of proof in cases involving "SL&C" notations, see Section 5.2 in *Freight Claims in Plain English* (3rd Ed. 1995).

495) SHIPPING HAZARDOUS MATERIALS

Question: I need some clarification, please. I have read every article related to this including Appendix 12 on page 453 of Transportation, Logistics and the Law and cannot find a definitive answer. While we ship very little hazardous materials, we do have some. We, as the shipper, prepare our own bills of lading. They are computer generated every time we ship. I have the certification, Section 7, box certification, emergency response number, and carrier acknowledgement of required placards on the right side of our bill of lading. I have the place for the shipper and/or carrier to sign at the very bottom of the bill of lading due to the fact we do not have enough room after all of the above. There is some question as to whether or not the shipper must sign immediately after the certification of proper packaging, etc. It is my opinion since we issue the bill of lading and have the signature at the bottom for both shipper and carrier, it is not a legal requirement to have a line immediately following the certification. Please advise.

Answer: The answer may be found in the federal hazmat regulations, the relevant portions of which are as follows:

> 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.

496) TARIFFS - FILING REQUIREMENTS

Question: How are tariffs filed and what is the need for them?

Answer: The requirement for motor carriers to file tariffs with the Interstate Commerce Commission ("ICC") (now the Federal Motor Carrier Safety Administration) was eliminated with the Trucking Industry Regulatory Reform Act of 1994 ("TIRRA"), Pub. L. No. 103-311 (Aug. 26, 1994) and the ICC Termination Act of 1995 ("ICCTA"), Pub. L. 104-88, 109 Stat. 804 (Dec. 29, 1995). Motor carriers may still maintain and publish tariffs, and may participate in jointly-made tariffs such the National Motor Freight Classification, but are not required to file them.

A motor carrier is required to provide a copy of applicable tariffs to a shipper, but only if requested by the shipper, see 49 U.S.C. § 13710(a)(1) and 49 U.S.C. §14706(C)(1)B.

497) TERMS OF SALE – LIABILITY VERSUS TITLE

Question: This question pertains to FOB destination terms.

My company ships prepaid. The bill of lading doesn't say FOB destination. I assume if nothing is noted it would be FOB destination. If so, when the carrier picks up the freight, does he have ownership at that point until he delivers the shipment to the customer (destination)? If our customer pays us for the product before we shipped it, does the carrier still take ownership until delivered to destination?

Answer: First, the terms of sale ("FOB terms") only govern risk of loss as between the seller and the buyer of the goods (and not the carrier). As a general rule, if the contract of sale (or purchase order, invoice, etc.) is silent as to whether the terms of sale are "FOB place of shipment" or "FOB place of destination", there is a presumption that it will be "FOB place of shipment". This presumption is not expressly stated in the UCC per se, but comes from the court decisions. Thus, if your invoice or purchase order documents do not specify any terms of sale, it would be presumed that the risk of loss passes to the buyer when the goods are tendered to the carrier at origin.

Second, the carrier never takes "title" to the goods it transports. It does have common carrier liability for loss, damage or delay to goods in its possession, i.e., it is legally liable if something happens to the goods it carries, but it does not own them.

498) THIRD PARTIES - SHIPPER'S AGENTS

Question: My question relates to the use of Shipper's Agents. As corporate sends consultants to audit our transportation parameters quite often, I would appreciate your input with regard to the risk of using an agent who wants to work with us on a shared savings program, using their recommended carriers.

I obviously have a problem in using this type of entity, as first and foremost they lack operating authority and would subject us to any risk incurred as a result of the agent's actions. However, it would be best to hear of these risks and concerns from someone such as you.

Answer: I don't know what kind of agreements you have with these "Shipper's Agents", but I can see a lot of issues that would give me concern.

1. You mention "shared savings", which would indicate that there has to be a well-established baseline for your transportation costs for each type of commodity, weight range, origin/destination or lane, etc., and some very clear formulas to adjust for variables such as fuel cost, insurance, inflation, etc. If not, then there is a serious potential for a dispute as to whether there are in fact any "savings". In my experience, most "gain-sharing" schemes just do not work. Query: if the "agent" fails to meet its targeted savings, are there any penalties?

2. If the "agent" is arranging for transportation services with motor carriers and receiving any kind of compensation (from either the shipper, the carrier, or both), it is a broker and must have operating authority and be registered with the FMCSA. If not, it would be acting illegally.

3. If the "agent" is asset-based (related to a motor carrier), or for that matter, is getting some kind of rebate or kick-back from carriers, there is a serious potential for a conflict of interest.

4. If the "agent" will be performing any functions involving actual handling of the freight such as warehousing, consolidation or transportation, you must thoroughly define its liability for any loss or damage to goods while in its possession, as well as its charges for each of the services.

5. If the "agent" will be performing any freight bill auditing or freight payment functions, strict procedures and accountability are critical.

6. Depending on what kind of contract you have, the "agent" may or may not have any liability if it fails to protect your interests in dealing with third parties (negligent carrier selection, liability limitations for cargo loss or damage, exposure to "double payment" liability for freight charges, etc.

499) THIRD PARTIES – WHAT ARE THEY?

Question: We have product that goes to third party warehouses (distribution centers (DCs)). Those DCs then transport the product to the customer on our behalf. There is a question as to whether they need to have a freight forwarders license to do that?

Also, as to what sort of proof of insurance we should require of them.

Answer: From the limited information you have provided it is possible that the distribution center could be acting as a broker, a freight forwarder or as a motor carrier. The statutory definitions of each are found in 49 USC. 13102:

> Sec. 13102. Definitions
>
> In this part, the following definitions shall apply:
>
> (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.
>
> (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...

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

If the services provided by the distribution center fall within any one of these definitions, it would be required to register with the Federal Motor Carrier Safety Administration (FMCSA), obtain appropriate operating authority, and comply with the requirements for insurance/surety bond and registered agents for service of process

500) TIME TO PICK UP FREIGHT

Question: If we contract a carrier to pick up merchandise at our customer and return it to our warehouse, how long does this carrier have (by law) to perform this service? I have been told they have up to six months.

Answer: There is no "law" that governs how quickly a carrier must respond to a shipper's request to pick up a shipment. If the carrier has picked up a shipment, then it is obligated to deliver it with "reasonable dispatch" - the usual and customary time to transport a similar shipment from the origin point to the destination point.

You mention a "contract". If you do have a contract with the carrier, it should specify the carrier's obligations clearly, and such a contract provision would be enforceable. Under the circumstances that you describe, if you don't have a contract, you should consider using another carrier.

501) TRANSPORTATION LAW AND REGULATIONS

Question: Where can I get a copy of the Interstate Commerce Act?

Answer: The "Interstate Commerce Act" is part of Title 49 of the U.S. Code. You may access this and related materials from one or more of the following free legal research websites:

Cornell Law website - an excellent resource for many areas of the law:
http://www.law.cornell.edu/

Indiana University Law School website:
http://www.law.indiana.edu/v-lib/

Government printing office - This is the official federal government website for all U.S. government publications:
http://www.access.gpo.gov/

Code of Federal Regulations - These are the rules and regulations issued by the various federal agencies:
http://www.gpo.gov/nara/cfr/index.html

Federal Register - The Federal Register is the official daily publication for Rules, Proposed Rules, and Notices of Federal agencies and organizations, as well as Executive Orders and other Presidential Documents:
http://www.access.gpo.gov/su_docs/aces/aces140.html

Internet Law Library - The Internet Law Library (formerly the U.S. House of Representatives Internet Law Library) was originally provided to the public courtesy of the Office of the Law

Revision Counsel of the U.S. House of Representatives, as part of the Counsel's mission to make the law (particularly the U.S. Code) available to the public.

http://www.lawguru.com/ilawlib/index.html

502) TWENTY-TWO QUESTIONS AND ANSWERS

Question: I am reviewing a contract that refers to the following:

All claims will be filed and resolved in accordance with the provisions of 49 CFR 1005, including the I.C.C.'s order of 4/18/72 regarding "Twenty-Two Questions and Answers" in Ex Parte No. 263.

I cannot find any information regarding "Twenty-Two Questions and Answers" from Ex Parte No. 263.

Can you advise me what this is, and should you have a copy of this, can you forward to me.

Answer: First, the reference to "49 CFR 1005" is obsolete since that section of the regulations was re-numbered as "49 CFR Part 370" following the ICC Termination Act of 1995, and the transfer of functions to the Federal Motor Carrier Safety Administration ("FMCSA"). Part 370 is entitled: "Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage".

Ex Parte 263 was an ICC proceeding that led up to the enactment of the regulations, and the "22 Questions and Answers" were published in an Administrative Order in 1972 to assist carriers in understanding and complying with the regulations.

A discussion of the claims regulations, together with the full text of the regulations and the "22 Questions and Answers" can be found in *Freight Claims in Plain English* (3rd Ed. 1995), which is available from the Council.

503) UNDELIVERED FREIGHT – ON HAND NOTICE

Question: Can you tell me what a "On Hand Notice" is?

Answer: If a shipment is rejected or refused by the consignee or cannot be delivered for some reason, the carrier has a legal duty to notify the shipper, owner and/or consignee that the goods are ""on hand" and to request instructions as to the disposition of the goods. See, e.g., Section 4(a) of the terms and conditions on the reverse side of the Uniform Straight Bill of Lading.

Typically, an "on hand notice" will also indicate that storage charges may accrue after a certain period of time, the storage charge rate, and a notice that the goods may be sold at public auction if no instructions are received by a certain date. A sample notice is included as Form 4 in "Freight Claims Filing and Recovery", one of the publications offered by T&LC.

INDEX

TABLE OF AUTHORITIES

Cases

Statutes