

TRANSDIGEST

Transportation & Logistics Council, Inc.

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GUEST EDITORIAL

CARGO SEALS

By Phillip Lamb, Senior Claims Manager
Coyote Logistics, LLC

In a recent conversation, the subject of seals and seal integrity came up and led to a spirited debate. Based on that discussion, I wanted to look at both sides of this subject and share just a sampling of the opposing views that are being debated in the industry.

There are groups (shippers/manufacturers) within the United States that firmly believe that the Food and Drug Administration, through the Bio-Terrorism Act of 2002 and various iterations of The Sanitary Food Transportation Act, has clearly defined the use of seals, and with it food safety; and there are others (carriers/brokers/insurance companies) who disagree with that interpretation and feel it is not clear cut and it has room for interpretation. To clarify, since 1990 there have been various sanitary food transportation acts passed, but not implemented. The current form is undergoing rule making proceedings at this time. None of the acts expressly deal with seal integrity, but many groups believe that it can and should be read to address such issues.

On one end of the spectrum, carriers/brokers/insurers may take the position that a broken or missing seal alone does not mean that the shipment has incurred any damages. Under this view, the shipment should not be deemed contaminated or adulterated merely because the seal is broken or missing, unless damages can be proven as clearly laid out in Carmack. Otherwise, there is no valid claim to support rejection and/or destruction of the goods. Proponents would further argue that the Bio-Terrorism Act and Sanitary Food Transportation Acts only contain guidelines, and that there aren't any laws or regulations that specifically address seal integrity from a claims liability perspective.

Shippers/manufacturers may have a different view. According to their viewpoint, the existing acts do in fact cover contaminated and/or adulterated shipments with respect to missing or broken seals, and mandate that the food supply chain safety responsibility falls on all of participants in the food industry. As a result, the shipper may believe that it does not have the responsibility to prove or disprove contamination due to a broken or missing seal, as the only way contamination could be proven would be through a comprehensive testing of each item, that would not only render the product unusable, but would also be cost prohibitive in comparison to the overall cost of the shipment.

To support this side's position, there is a recent court case of *Oshkosh Storage Company vs. Kraze Trucking LLC*, Case no. 13-C-1246. In summary, the shipment was picked up sealed and moved to the end destination. The carrier entered through a guard shack and there were signs and notes everywhere that

stated the warehouse personnel are the only ones to remove a seal. The driver was told to back in to the dock and he took the seal off to open his doors. The warehouse refused the shipment denoting that it had been compromised. The receiver felt that without knowing that the seal was intact until final receipt by the warehouse personnel, there was no way to prove the cargo was not contaminated or adulterated and so the value of the load was lost to them. The shipper argued that there was enough information provided to the carrier regarding the seal intact requirement, and that the carrier should be responsible for the full value of the shipment without being required to prove damages. The judge ruled in favor of the warehouse and the shipper, and the carrier was liable for the full value of the shipment due to the seal being removed.

As you can see, each side feels their interpretation/position is within the intent of the Acts; however, there is enough ambiguity, difference of opinion, and financial risk on this subject that I am sure there will be more cases that will go through the court system in order to get a proper ruling on this issue. In my opinion, until legislation clearly defines the responsible parties and potential liabilities, a clear, concise, and fair seal policy understood and contractually agreed upon by all parties (shippers, manufacturers, receivers, carriers, brokers, etc.) may be the best solution for the industry.

Stay tuned.

ASSOCIATION NEWS

PLAN NOW FOR THE COUNCIL'S 41ST ANNUAL CONFERENCE

The Transportation & Logistics Council, Inc.'s 41st Annual Conference, "Education for Transportation Professionals", will be held at the DoubleTree by Hilton Orlando at SeaWorld, March 23 - 25, 2015.

Register now for the Conference and take advantage of the Early Bird Rate - ONLY \$595.00 for members and \$695.00 for non-members (after January 23, 2015 registration will increase). To register or for more information visit http://www.tlcouncil.org/41st_Annual_Conf_Info.

A block of rooms has been reserved for March 15, 2015 - March 31, 2015. The special room rate of \$139.00 will be available until February 18th or until the group block is sold-out, whichever comes first. Visit http://doubletree.hilton.com/en/dt/groups/personalized/M/MCOSRDT-TLC-20150315/index.jhtml?WT.mc_id=POG to make your room reservations.

The preliminary Conference Program is attached. Optional pre-conference Seminars on "Freight Claims in Plain English", "Contracting for Transportation & Logistics Services" and "Transportation, Logistics & the Law" will be offered the Sunday before the conference on March 22nd.

There will also be a CCP Primer Class on March 22nd, and Exam on March 25th. For information and pre-qualification requirements go to www.ccpac.com.

Highlighting the session on Monday, March 23rd will be James L. Welch, Chief Executive Officer of YRC Worldwide, Inc., as the luncheon guest speaker. YRC is a leading provider of less-than-truckload transportation services throughout North America and Welch has more than 35 years of being involved in the transportation and logistics industry to share with TLC members.



If you would like to be a sponsor or an exhibitor please contact Diane Smid at 631-549-8984 or email: dianes@transportlaw.com.

NEW MEMBERS

The Transportation & Logistics Council would like to welcome the following new members:

Regular Members

Jim Syfan

Syfan Logistics, Inc.
2037 Old Candler Road
Gainesville, GA 30507
jim.syfan@syfancorp.com

Anthony Wallace

American Transportation Management, LLC
Cleveland, TN 37312
awallace@atm-usa.com

CLASSIFICATION

FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD (“CCSB”) DOCKETS

	Docket 2015-1	Docket 2015-2
Docket Closing Date	November 13, 2014	April 2, 2015
Docket Issue Date	December 11, 2014	April 30, 2015
CCSB Meeting Date	January 27, 2015	June 1, 2015

Dates are as currently scheduled and subject to change. For up-to-date information, go to <http://www.nmfta.org>.

INTERNATIONAL

U.S. – MEXICO CROSS-BORDER TRADE

On October 17, 2014, U.S. and Mexican authorities signed a mutual recognition agreement that seeks to increase collaboration between Customs & Border Protection’s (“CBP”) Customs-Trade Partnership Against Terrorism, or C-TPAT, and Mexico’s Tax Administration Service New Certified Companies Scheme, or NEEC (its Spanish acronym) — the two countries’ trusted trader programs. The goal of the mutual recognition arrangement is to link the two industry partnership programs so that they create a unified security front that can assist in securing and facilitating global cargo trade.

Total two-way goods trade between the U.S. and Mexico totaled \$507 billion in 2013, with \$226 billion in exports and \$281 billion in imports, according to the Office of the U.S. Trade Representative. Clogged border crossings in San Diego County cost the U.S. and Mexican economies close to \$7.2 billion in gross output and more than 62,000 jobs in 2007, the latest data available, according to the San Diego Association of Governments.

Members of trusted trader programs who voluntarily submit to an extensive verification process are able to move goods across the U.S.-Mexico border faster than those who are not enrolled. The agreement potentially benefits anyone involved in cross-border trade in both countries, from shippers to manufacturers to brokers. Eventually, it could lead to a single application for both the U.S. and Mexican programs.

According to the announcement, “the arrangement provides tangible and intangible benefits to program members to include: fewer exams when shipping cargo, a faster validation process, common standards, efficiency for Customs and business, transparency between Customs administrations, business resumption, front-of-the-line processing, and marketability.”

Since November, 2001 C-TPAT has enrolled close to 11,000 members of the trade community and Mexico’s program, launched in January, 2012, currently has 392 participants.

In addition to Mexico, the United States also has mutual recognition arrangements with New Zealand, Canada, Japan, Korea, Israel, Jordan, the European Union and the Taipei Economic and Cultural Representative Office.

Visit <http://www.cbp.gov/newsroom/national-media-release/2014-10-17-000000/us-mexico-sign-mutual-recognition-arrangement> to view the CBP’s announcement.

MOTOR

NEW YORK & NEW JERSEY SEEK MEANS TO REDUCE TRUCK CONGESTION

In November the Port Authority of New York-New Jersey (“PANYNJ”) released a Tier I Draft Environmental Impact Statement (“EIS”) on its “Cross Harbor Freight Program”. According to the Executive Summary of the EIS, the Federal Highway Administration (“FHWA”) and the PANYNJ prepared the EIS to evaluate Cross Harbor Freight Program (“CHFP”) alternatives:

The primary purpose of the CHFP is to improve the movement of freight across New York Harbor between the east-of-Hudson and west-of-Hudson regions. By improving the movement of goods across the harbor, the CHFP would provide near-term and long-term improvements to the regional freight network, reduce truck traffic congestion, improve air quality, and provide economic benefits. Ten Build Alternatives have been selected for evaluation of benefits and potential environmental effects in the EIS. The benefits and potential environmental effects of the Build Alternatives are compared to the No Action Alternative, which assumes that CHFP would not be implemented but that other planned and funded actions of independent utility would move forward.

The EIS listed four project goals as follows:

1. Reduce the contribution of cross-harbor truck trips to congestion along the region’s major freight corridors relative to No Action conditions.
2. Provide cross-harbor freight shippers, receivers, and carriers with additional, attractive modal options to existing interstate trucking services.
3. Expand facilities for cross-harbor goods movement to enhance system resiliency, safety and security, and infrastructure protection.
4. Support development of integrated freight transportation/land use strategies.

Traffic congestion, highway wear-and-tear, emissions concerns and rising drayage costs prompted the port authority to evaluate other options to move freight in and out of the port of New York-New Jersey. The Build Alternatives to be considered include new rail connections and creating a tunnel with special railcars, much like the Eurotunnel running under the English Channel. Rail tunnels with automated guided vehicle technology and those with heights to handle double-stacked containers are also being considered. Other options to be considered are waterborne, including adding lift-on, lift-off container barges or roll-on, roll-off container barges. The authority is also considering whether ferry services to move trucks are feasible.

The PANYNJ will hold a series of public comment sessions in early 2015. After the environmental impact of each alternative is assessed, the authority will conduct a site-specific review to help identify the projects that are most viable. The PANYNJ could also choose to not take any action.

Comments are due by February 27, 2015. Visit <http://www.panynj.gov/about/cross-harbor.html> for more information and a link to the Draft Tier I EIS.

REPORT SHOWS THEFT DOWN, BUT VALUE UP

A recent study released by FreightWatch International (“FWI”) for the third quarter of 2014 showed that thefts were down, but the loss value increased. For the third quarter of 2014 there were:

a total of 194 Full-Truckload (“FTL”) cargo thefts and 14 Last-Mile Courier thefts for a total of 208 incidents in the United States. In this quarter, 70 of these FTL thefts occurred in July, 76 occurred in August, and 48 occurred in September. The average loss value per incident during the quarter was \$321,521. Through an annual comparison with Q3-2013, the volume of cargo thefts declined by 20%; however, loss value increased by 104%.

The FWI report breaks down cargo theft by cargo type stolen, type of theft event (e.g. theft of trailer, deceptive pick-up, or hijacking, etc.), and by geographic location.

To view the report, visit <http://www.freightwatchintl.com/intelligencecenter> and create an account. It should be noted that FWI also provides more comprehensive reports and reports for various localities around the world.

In addition, FWI has recently posted a white paper “Combating Cargo Theft—The Secret Sauce is Common Sense” that provides, as the title states, some common sense means to protect your property and avoid theft.

TRANSPORTATION PRICING

SMOKE AND MIRRORS – WHAT IS THE ACTUAL DISCOUNT?

by Tony Nuzio, ICC Logistics Services, Inc.

For years now the transportation industry has been using the “Retail Sell” to attract customers. Do you know what we mean by the “Retail Sell”? Does this sound familiar?

“Buy 1 at regular price and **get two free!**” Or, on the TV Infomercials, “But wait, if you order within the next 10 minutes we’ll double your order at no additional cost, **just pay the additional shipping and handling charges!**” These are just two examples of how we, as consumers, are constantly being bombarded by the “Retail Sell.” The “Retail Sell” attempts to convince the buyer they are receiving a great deal and not to pass it up.

Well, not much is different for transportation service providers who use their version of the “Retail Sell” (which we call the “Discount Game”) to attract their customers. Today, it’s not uncommon for shippers to be receiving discounts in the high 80% range. Wow, that’s impressive....maybe.

You see, if the carriers are offering discounts at these high percentages, one has to question just how high are the base rates their carriers are discounting. How else can these carriers afford to offer these huge discounts? Unfortunately, many shippers just accept these discounts as being a great deal for their company and the truth is, they very well may be, but wait, there’s more.

There is much more shippers should be doing to make sure they fully understand what their actual discounts are and, more importantly, what they should be. There are several reasons for this:

- Most shippers are not aware of the fact that each carrier publishes their own base rates to meet their individual revenue needs. So comparing discounts from one carrier to another carrier is of no use. And, shifting business to a carrier with a higher discount, may actually cost the shipper more money in the long run.
- Secondly, each carrier establishes their own fuel surcharge percentages to again meet their individual financial needs. In fact, some carriers add the fuel surcharge to the gross rate, (before the discount is deducted) and some add the fuel surcharge to the net rate, (after the discount has been deducted) these calculations can result in a huge difference. And, carriers also begin to assess the Fuel Surcharge at different Diesel Fuel Price per Gallon points.
- In addition, each carrier establishes their own Accessorial Fees for the ancillary services they provide. Again, the differences in these fees from carrier to carrier can be significant.

So how can a shipper be sure they are getting “The Best Deal” for their company? The only true way is to benchmark their rates against the competing carriers in their respective service areas. Shippers can attempt to do this by creating Requests for Proposals from competing carriers to see how each carrier’s rates stack up against the competition. But this too may leave the shipper wondering, do they really have the “Best in Class” rates for their specific business.

To properly perform this analysis, shippers really need to work with transportation and logistics consultants and freight invoice auditors who have extensive knowledge of carriers’ pricing structures - firms that maintain huge data bases of carrier rates and fees that can provide the shipper with a comprehensive benchmarking analysis to ensure they obtain the lowest possible rates for the services they require to run their business. An actual case in point is a manufacturing client of ours that had a pricing agreement that provided a 78% discount for all of their LTL shipments. After we assisted our client in re-negotiating their LTL contract, the manufacturer’s LTL freight costs were reduced by a whopping 50% utilizing the same LTL carrier the manufacturer had been using for several years. The client could not obtain “Best in Class” rates on their own; they needed our expertise to get them there.

One final point: a shipper should NEVER sacrifice service for lower rates. If the carrier(s) cannot provide the service the shipper requires, they should not be part of any benchmarking analysis. This is another critical area the transportation and logistics consultant can assist the shipper with, an extremely valuable service they may not be able to obtain on their own.

2014 REPORT ON CRITICAL ISSUES IN THE TRUCKING INDUSTRY

In October the American Transportation Research Institute (“ATRI”), part of the American Trucking Associations Federation, released its *Critical Issues in the Trucking Industry – 2014* report. According to the report, which includes proposed strategies to address the issues, the top ten issues facing the trucking industry are:

1. Hours of Service
2. Driver Shortage
3. CSA Compliance, Safety, Accountability
4. Driver Retention
5. Electronic Logging Device (“ELD”) Mandate
6. Truck Parking
7. Transportation/Infrastructure/Congestion/Funding
8. Driver health/wellness
9. Economy
10. Driver Distraction

The report is based on a survey of stakeholders which was started in 2005. Included in the report is a chart showing the historical rankings of the top ten issues since 2005.

Visit <http://atri-online.org/wp-content/uploads/2014/10/ATRI-2014-Top-Industry-Issues-Report-FINAL.pdf> to access the report

OCEAN

WEST COAST PORT UPDATE

The situation on the West Coast continues to be unresolved, and tensions are rising. While negotiations between the Pacific Maritime Association (“PMA”) and the International Longshore and Warehouse Union (“ILWU”) continue, there has been no substantive progress since August and there have been work slowdowns by the ILWU resulting in delays and port congestion.

To make matters worse, on November 20, 2014 the PMA announced that they had been notified by the ILWU that the ILWU will only participate in subcommittee meetings, not full bargaining sessions. This amounts to a 12-day Thanksgiving holiday break, until December 1st.

Various stakeholders (retailers, shippers, importers, exporters, etc.) and legislators have been pushing for a resolution, even to requesting for the President to appoint a federal mediator. The White House will not appoint a federal mediator to move negotiations along unless and until both sides, the IWLW and PMA, make such a request. So far, the situation has not risen to that level.

While there is some dispute as to whether ILWU members are causing the slowdowns, as this is denied by the ILWU, the fact remains that crane productivity has decreased. At the end of October work slowdowns began in Tacoma and spread to Seattle, with the PMA reporting that the slowdowns at these Pacific Northwest ports resulted in terminal productivity being reduced by an average of 40 to 60 percent. Then the PMA stated that the ILWU began filling only about 50 percent of the orders for skilled workers in Los Angeles-Long Beach, and longshoremen began work slowdowns in Oakland as well. This reduced productivity has exacerbated the congestion some ports are suffering, though there should be some relief as cargo volumes decline with the peak-season coming to an end.

In the meantime, truck turn times at the ports are getting long enough that the Harbor Trucking Association (“HTA”) serving the Los Angeles and Long Beach terminals is seeking an hours-of-service (“HOS”) rules exemption from the Federal Motor Carrier Safety Administration (“FMCSA”). Local port drivers are reportedly reaching their HOS limits on driving time due in large part to the unabated waiting times at many of the area’s container terminals.

In other related news, some nine ocean carriers that had on November 14, 2014 announced the imposition of congestion surcharges on cargo moving from Asia to the U.S. West Coast to be effective November 17, have now backtracked and did not impose the fees, which were as much as \$1,000 per 40-foot container. While the carriers did not provide a reason for their reversal, there was a strong adverse reaction from shippers to the initial surcharge announcement. The reversal by these carriers does not mean that a surcharge will not be imposed at some future date, and five carriers have announced that they will proceed with surcharges (including some that had backtracked on the surcharges).

On November 20, Mediterranean Shipping Co. (“MSC”) announced that starting November 26, it would impose a congestion surcharge of \$800 per 20-foot container, \$1,000 per standard 40-footer and \$1,125 per 40-foot, high-cube. Four additional carriers - Hanjin Shipping, Hyundai Merchant Marine, NYK Line and Zim Integrated Shipping Services – will impose similar congestion surcharges.

Carriers justify the surcharges as being necessary to address significantly higher costs related to slow productivity, staffing limitations and other labor related issues which have disrupted normal port operations and led to congestion at U.S. West Coast ports. The carriers are racking up additional fuel costs from having to wait at sea for the chance to berth. They are also suffering losses and expenses because of blanked sailings, skipped port calls and speedup of existing vessels or chartering of added ships and equipment to maintain schedules. Additionally there are shoreside costs that include container detention and storage charges, overtime costs for labor, extended gate hours and fees, tug services and increased trucking charges relating to inter-terminal transfers.

While not the sole cause of these problems, a resolution of the PMA/ILWU labor agreement would go a long way to clearing up the congestion and getting the West Coast ports fully operational.

QUESTIONS & ANSWERS

By George Carl Pezold, Esq.

FREIGHT CLAIMS – LIABILITY FOR COST OF CLEAN UP

Question: I have a carrier who was involved in an accident delivering a carbonated beverage.

The carrier (carrier’s insurance) paid for the damaged product but they would NOT pay for the cost of cleaning the mess off the highway, claiming an exclusion. Correct me if I’m wrong but I thought because the product is considered food or beverage the cost of cleaning should be paid with no problem. The carrier assumed liability when they paid for damages to the product and therefore should pay cleaning costs, correct? The carrier is not responding to any attempts of contact. What recourse do we have?

Answer: Regardless of whether the carrier’s cargo insurance policy covers the clean-up, I think the carrier is clearly responsible for these costs.

Furthermore, I would note that the carrier is required to file an MCS-90 endorsement to its business automobile liability policy with the Federal Motor Carrier Safety Administration (“FMCSA”) that covers “public liability”, which includes “Environmental Restoration”. The following are the definitions from the MCS-90 endorsement:

Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to

minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

Public Liability means liability for bodily injury, property damage, and environmental restoration.

Thus, even though the clean-up may not be covered under the carrier's cargo liability policy, it should be covered under the MCS-90.

FREIGHT CLAIMS – NO WAY TO NOTE VISIBLE DAMAGE AT TIME OF DELIVERY

Question: We had a less-than-truckload delivery with damage visible on the pallet. The company did not have a paper delivery receipt, but an electronic device similar to those DIADs (Delivery Information Acquisition Device) that United Parcel Service uses. So our receiver had no way to physically make note of the damage, he could only sign his name on the device.

He told the driver to note the damage and the driver stated he would put a note of the damage in his device. When I called the freight company to put in a claim they stated they showed free and clear delivery, no damages noted. I told them there was nothing for us to sign and we informed the driver to do this, but they say there is nothing noted. What recourse do I have to get full claim value?

Answer: This is somewhat similar to a "concealed damage" situation, in which there is no notation of damage at the time of delivery.

The "clear delivery" is not a defense to the claim, but it does place an additional burden on the consignee to establish that the damage in fact occurred at or before the time of delivery, and not afterwards. I suggest that you get a written statement from a person that has actual knowledge of the delivery and can testify that the damage did exist at that time, and submit it to the carrier.

With hindsight, in these days of ubiquitous camera phones, taking pictures at the time of delivery that show the damage would be very helpful.

Of course, if the carrier still refuses to pay the claim you may have to bring a lawsuit.

FREIGHT CLAIMS – NOTATION MADE ON DELIVERY RECEIPT AFTER DELIVERY

Question: A large customer of ours filed claim for wet steel and provided a proof of delivery showing a "wet" notation at delivery. The delivery receipt received by the driver shows no such notation. Is it unlawful for a delivery receipt to be altered after the driver has left the consignee?

Answer: It is not "illegal" for the consignee to make a notation on the delivery receipt after the driver has left.

However, since the carrier's copy has no such notation, the carrier might take the position that the delivery was made without exception, based on its "clear" delivery receipt.

In any event, the consignee/claimant still has the burden of proving that there was damage at the time of delivery (and not afterward).

FREIGHT CLAIMS – DUTIES & TAXES ON IMPORT SHIPMENT

Question: When submitting a claim for water damage to a freight forwarder, am I allowed to include cost, freight, duties and taxes? Would the carrier pay me for the duties and taxes, or do I have to claim the duties and taxes from another source?

Answer: I assume this is an import shipment that was delivered in a damaged condition. If so, the usual measure of damages would be the “landed cost” which includes the freight, duty and taxes, less net salvage proceeds, if any.

FREIGHT CHARGES – TERMS OF PAYMENT

Question: I was wondering, is there is a requirement, standard, law, etc. stating that freight carriers must be paid within 10 days of their service? I have set up “net 30 day” terms of payment with freight brokers we do business with, but was hoping to establish net 30 day terms with our direct freight carriers.

Answer: As you may know, the Interstate Commerce Commission (“ICC”) was “sunsetting” effective December 31, 1995. However, some of the old ICC regulations were transferred to the Federal Motor Carrier Safety Administration’s (“FMCSA”) jurisdiction and still exist. 49 CFR Part 377 governs the extension of credit to shippers by motor carriers and provides:

(a) Authorization to extend credit.

(1) A carrier that meets the requirements in paragraph (a)(2) of this section may

- (i) Relinquish possession of freight in advance of the payment of the tariff charges, and
- (ii) Extend credit in the amount of such charges to those who undertake to pay them (such persons are called "shippers" in this part).

(2) For such authorization, the carrier shall take reasonable actions to assure payment of the tariff charges within the credit periods specified

- (i) In this part, or
- (ii) In tariff provisions published pursuant to the regulations in paragraph (d) of this section.

(b) When the credit period begins: The credit period shall begin on the day following presentation of the freight bill.

(c) Length of credit period: Unless a different credit period has been established by tariff publication pursuant to paragraph (d) of this section, the credit period is 15 days. It includes Saturdays, Sundays, and legal holidays.

(d) Carriers may establish different credit periods in tariff rules: Carriers may publish tariff rules establishing credit periods different from those in paragraph (c) of this section. Such credit periods shall not be longer than 30 calendar days.

Many carriers will tell you that shippers must pay freight bills within 15 days, but that is not the law, since this regulation only governs CARRIERS. It doesn’t apply to SHIPPERS.

I would also note that, under 49 USC 14101(B), carriers and shippers are free to enter into contracts that contain different provisions for freight payment. In addition, there is no similar regulation that would apply to brokers, so that payment terms as between a shipper and broker are also negotiable and subject to agreement between the parties.

FREIGHT CLAIMS – LIABILITY FOR SHORTAGE

Question: Our driver picks up a (flatbed) load of miscellaneous pipe fittings and U-bolts. Driver was on the property, but not on the loading dock. After the truck was loaded, the driver was handed a bill of

lading with a number of pieces and parts listed along with quantities of said parts; 300 of these, 50 of those, etc.

At delivery the consignee marked 300 of one item were not delivered and a freight claim was issued to our company from the freight broker. We contend that it is not feasible for driver to be able to count contents of crated materials and he in no way would or could know these quantities. The broker's response was that "driver should not sign for something he doesn't know what he is getting". We want to deny the claim based on the impossibility for driver to have been able to count hundreds of wigits inside a crate. Do we have a leg to stand on?

Answer: If you used the usual form of the uniform bill of lading it most likely says:

RECEIVED ... the property described below, in apparent good order, except as noted
(contents and condition of contents of packages unknown)

Thus the answer to your question really depends on how the items were packaged or crated, whether the number of packages was stated on the bill of lading, and whether the shortage was for a full package or crate.

If there was a shortage of a full package (and the number of packages was shown on the bill of lading), you would be liable for the shortage since the driver should have been able to count the number of packages. On the other hand, if the shortage was from a package that was delivered, and the driver was unable to verify the contents of the package, you would have grounds for denying the claim.

FREIGHT CLAIMS - INFESTATION

Question: We are a third party logistics provider ("3PL") who hired an intermodal carrier ("IMC") to move a load of palletized/shrink wrapped canned goods on behalf of our customer (the consignee) from PA to AZ. The IMC moved this load on their own equipment, not railroad owned containers.

When the load arrived at destination, the consignee rejected the entire load because the trailer was infested with bugs. Further investigation of the bugs found them to be native of PA. We have a statement from the shipper in PA that no other loads that went out during the same time frame had any bug issues. Furthermore they say they would have refused to load the trailer if bugs were NOTICEABLE at the time.

Because this was food grade product, our customer refused to consider accepting the load even after pest removal because there was no way to know for certain if every can was clear. Additionally the load sat in the carrier's yard for several weeks as we discussed resolution, so the integrity of the product was in question. We believe our customer is protected by the Food Safety Modernization Act in that it would be unreasonable for them to risk contaminating the food supply.

We then attempted to salvage the load, but upon inspection by the salvage company, the infestation was deemed to be so great that there would be no value to the load and we wouldn't even be able to donate it. Again, rightly so, nobody was willing to risk contaminating the food supply.

Now the carrier is denying responsibility for the claim, saying among other things 1) the bugs were on the product already at the shipper and 2) the consignee had a duty to accept the load and mitigate the damages. We have provided the carrier with supporting evidence and legal precedent that refutes their position, but they refuse to budge. I am curious as to your opinion and if you have any suggestions.

Answer: Questions about food and food-related products come up regularly and recent cases and proposed regulations will keep this issue on the front burner (see Guest Editorial above and discussion in Regulations below).

Contamination of food products, drugs, medicines or other items intended for human consumption is a serious matter. The mere possibility of contamination may, in and of itself, be sufficient.

There are federal regulations that cover food and drug items, and essentially state that a product is deemed “adulterated” if it is damaged and may have been contaminated. For example, there are provisions governing contaminated food under the Federal Food, Drug and Cosmetic Act - 21 USC 342(a)(4) and 342(i) as follows:

Section 342(a)(4) states, “A food shall be deemed to be adulterated ... if it has been prepared, packed, or held in insanitary conditions whereby it may become contaminated with filth, or whereby it may have been rendered injurious to health.” This provision has been used in the past to support damage claims.

Section 342(i), entitled “Noncompliance with sanitary transportation practices.” This provision states, “food shall be deemed adulterated ... if it is transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food under conditions that are not in compliance with regulations under section 350e of this title.”

See also the discussion in *Freight Claims in Plain English* (4th Ed. 2009) at Section 11.5.

It is quite common for receivers of food and related products to refuse or reject product if there is any evidence of infestation by insects, rodents or other pests, broken or missing seals, etc. Shippers often will take the position that it would be an unacceptable risk to allow the product to enter the market for human consumption, or that it would be impossible to adequately sample and test the entire product to ensure that the quality had not been compromised.

There is a recent court decision involving a broken seal on a shipment of cheese that discusses this subject, *Oshkosh Storage Co. v. Kraze Trucking LLC*, No. 13-C-1246 (E.D.Wis., July 17, 2014), in which the consignee was allowed to reject the shipment and the carrier was held liable for damages for breaking the seal, even though it was supposedly broken by the driver on the consignee’s property (he stated he broke the seal to open the doors so he could back up to the loading dock as instructed).

FREIGHT CHARGES – WITHHOLDING FREIGHT CHARGES PENDING CLAIM

Question: We hauled some Mercedes Benzes for a broker (no contract with broker) that upon pickup we noticed some slight damage to one of the vehicles and had the guard at the pickup location sign off on said damage. Upon delivery and invoicing, said broker refused to pay agreed upon rate until they could get an estimate of damage repair from Mercedes. The broker said the guard at pickup was not an employee of theirs or Mercedes. What is the law regarding them holding payment from us?

Answer: It is not uncommon for shippers (or brokers) to withhold payment when there is an open claim for loss or damage, and it is not “illegal” to do so.

If there actually was damage to the automobile while in the possession of the carrier, your company will probably be liable for the damage (subject to any liability limitation in its bill of lading or tariff). If there is enough money involved, it would probably be worth the effort to determine who the guard worked for and to get a statement regarding the damage from the guard.

Note that a carrier does have an obligation to accept and process a claim, whether or not the freight charges have been paid, see the federal claim regulations at 49 CFR Part 370. The obligation of the carrier to pay a legitimate claim and the obligation of the shipper (or broker) to pay freight charges are separate and independent obligations. Thus, if the broker refuses to pay the freight charges your remedy is to bring a lawsuit to collect your charges.

FREIGHT CLAIM – LOST SHIPMENT RECOVERED, CARRIER WANTS \$\$ BACK

Question: A less-than-truckload (“LTL”) shipment was lost in transit and the carrier paid the claim in full. Then one month later the carrier recovered the freight and delivered it back to the shipper instead of sending it to their salvage area.

The carrier is now asking for his claim money back. I confirmed with the shipper product was received back in good order, reboxed & returned to stock. Is the carrier entitled to the funds back or the product?

Answer: Based on your description of the facts, I think the carrier is entitled to a refund. However, you should be able to deduct the reasonable expenses for handling, repackaging, restocking, etc.

FREIGHT CLAIMS – CARRIER INSPECTION

Question: I am aware of Item 300140 of the National Motor Freight Classification (“NMFC”) section which provides for inspection time when a carrier is notified of a claim. However, if the freight is destroyed and the carrier is not provided the ability to inspect for whatever the reason may be, does that eliminate the carrier’s liability for the cargo claim? Is the right to inspect a prerequisite?

Answer: First, there is nothing in NMFC Item 300140 that says a carrier can decline a claim just because it did not have an opportunity to inspect damage before the goods were destroyed.

Regardless of whether the carrier actually inspects the goods, it still has an obligation to properly investigate all claims, see 49 CFR Part 370:

49 C.F.R. 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.

Obviously, the claimant does have the burden of proving that the shipment was tendered to the carrier in good order and condition at origin, and that there was loss or damage at the time of delivery. But this can be done through statements from persons that have knowledge of the facts and can describe what they observed.

I would note that it is always a good practice for the consignee to describe and report the condition when damaged goods are received, take photos, etc. - whether or not the carrier will send someone to inspect the damage.

There are many situations where carriers either waive the right to inspect damage or don't respond to requests for an inspection in a timely manner, and damaged goods are destroyed for various reasons, e.g., if they are perishable or the consignee has no place to hold them. This does not mean that the carrier can escape liability if it is in fact responsible for the damage.

FREIGHT CLAIMS – PAYMENT FOR DAMAGED GOODS THAT ARE ACCEPTED

Question: We delivered our materials to the job site. The straight bill of lading was signed with no notation of damage or concealed damage. The contractor has now advised us that the panels showed damage when the packages were opened.

The owner directed the contractor to install the panels as they had a venue that required the panels to be in place for acoustics. Is the contractor and owner obligated to pay for the materials?

Answer: If the purchaser accepted and installed the panels it would have to pay for them, regardless of whether there may have been some damage.

Of course, if the purchaser incurred any expenses to repair the panels it would either be entitled to file a claim against the trucking company or deduct the cost of repairs from your invoice, depending on whether the damage occurred in transit or was present when the shipment was tendered to the carrier.

RAIL

DANIEL R. ELLIOT III NOMINATED TO CHAIR STB

On November 12, 2014 it was announced that Daniel R. Elliot III was nominated by the President to serve a five year term as the chairman of the Surface Transportation Board (“STB”). The nomination must be confirmed by the Senate.

REGULATIONS

SANITARY FOOD TRANSPORTATION ACT

It has been reported that stakeholders are not happy with the recent attempt by the Food and Drug Administration (“FDA”) to regulate transportation related food safety pursuant to the Sanitary Food Transportation Act (“SFTA”) and Food Safety Modernization Act (“FSMA”). In particular, an industry consultant, Patrick Brecht, asserts that “the rules as proposed by the FDA would legally force receivers to reject loads of food if they were ever out of temperature range guidelines set by the shipper — no matter how narrow the guidelines. The way the proposed rules are written, it wouldn’t matter if the food was unsafe or not. If temperatures strayed by even one degree outside the shipper guidelines, the load would be considered adulterated.”

In comments by Wal-Mart, they noted that “transportation temperature requirements are established to maintain optimal product quality and are much more stringent than those required for product safety. If a food fails to meet a temperature limit established for quality requirements yet meets all temperature requirements identified for safety ... the food should not be considered adulterated.”

Wal-Mart said it’s concerned the vague wording could “lead to unnecessary increases in cargo claims, transportation and disposal fees, and a disruption of the overall supply chain. Food waste also continues to be a key national concern, and the proposed rule could lead to a significant increase in the waste of foods that are still safe for consumption.”

Another issue is the definition of “shipper,” with comments suggesting the FDA needs to clarify the meaning because, as written, it could be construed to mean shipper, receiver, broker, warehouse operator and sometimes even a carrier. The definition is key, because the rules hand certain legal responsibilities to shippers, as opposed to carriers.

To make matters even worse, under the proposed regulations, rejected loads couldn’t be sold for salvage at a discounted rate, as is the case now.

There are also other areas of contention in the rules that concern exemptions from the rules, cleaning of equipment, notification requirements and recordkeeping.

Visit <http://www.gpo.gov/fdsys/pkg/FR-2014-02-05/pdf/2014-02188.pdf> to view the proposed rules and visit <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm383763.htm> for the FDA's website.

TAB

TRANSPORTATION ARBITRATION BOARD - HELP WANTED

The Transportation Arbitration Board ("TAB") needs your help. Because of job changes and retirement, the list of TAB arbitrators is very short. Do you know anyone interested in serving as an arbitrator? Education points are awarded each time a person arbitrates a case. Arbitrator candidates should be certified by the Certified Claims Professional Accreditation Council ("CCPAC"). Also, please encourage your people to use TAB's services.

Please contact TAB Administrator, Wally C. Dammann, CCP, at wdammann@msigusa.com or by phone at (212) 230-2966, or fax at (212) 319-7061, for an application and/or additional information.

TAB provides an alternative means to resolve disputes, so long as both parties agree to be bound by its decision. TAB is jointly sponsored by the Transportation & Logistics Council and the Transportation Loss Prevention and Security Association. TAB has an inexpensive arbitration program for loss & damage claims. The arbitrators are knowledgeable transportation professionals that are selected from carrier and shipper backgrounds.

CCPAC NEWS

CERTIFIED CLAIMS PROFESSIONAL ACCREDITATION COUNCIL

Established in 1981, Certified Claims Professional Accreditation Council ("CCPAC") is a nonprofit organization that seeks to raise the professional standards of individuals who specialize in the administration and negotiation of freight claims. Specifically, it seeks to give recognition to those who have acquired the necessary degree of experience, education and expertise in domestic and international freight claims to warrant acknowledgment of their professional stature. While CCPAC promotes certification, it is not required for Associate Membership.

Earn CCPAC Continuing Education credits with new on-line webinars. In cooperation with CCPAC, Delta Nu Alpha Transportation Fraternity ("DNA") is offering 6 webinars pre-recorded at the University of Alaska. Individuals seeking CCPAC continuing education credits must notify DNA by email when they register. The choices of topics are:

- General Principles of Federal Transportation Law and Bill of Lading Terms and Conditions
- Motor Carrier Service Terms and Conditions affecting freight charge collection, freight claims, accessorial charges and more.
- Cargo Claim Mitigation, Adjustment and Resolution - A practical analysis of the Carmack Amendment and Handling of motor carrier claims.
- Liability Runs Up The Supply Chain - Who is responsible for certifying motor carriers as fit for use? A critical analysis of SMS methodology.

- Contracting for Interstate Truck Service - Typical issues to be addressed in shipper/carrier contracts / a discussion of 13 provisions in typical shipper contracts which affect the risk analysis of carriers and brokers Part 1
- Contracting for Interstate Truck Service - Typical issues to be addressed in shipper/carrier contracts / a discussion of 13 provisions in typical shipper contracts which affect the risk analysis of carriers and brokers Part 2

Additional information can be obtained by contacting John O'Dell, Executive Director of the Certified Claims Professional Accreditation Council, Inc. ("CCPAC"), by phone: 904-322-0383 or email: jodell@ccpac.com or visit <http://www.ccpac.com/>.

PERSONAL

TRANSPORTATION AND LOGISTICS DEGREE IN PACIFIC NW

Lake Washington Institute of Technology's Bachelor of Applied Science ("BAS") in Transportation and Logistics Management program prepares future managers for success in a critical and fast-growing industry. Our graduates are ready to take management positions with big and small companies that provide transportation or logistics services or analyses, warehousing, fleet maintenance or management, and sales and account management. Or they may work with ancillary industries such as component manufacturing or inventory control. The possibilities are endless, including jobs with road and rail transport operations; airports, seaports and public transit authorities.

This bachelor's degree gives people who are already hold Associate-level degrees in aspects of the industry the opportunity to further their education and step up into management and administrative posts. Using their familiarity with the hands-on aspects of their companies' work and putting new, advanced skills and knowledge to work, there's benefit to go around—The program advances students' career options and expands expertise available to employers.

Interested persons are encouraged to contact:

Shawn Sullivan, Manager, Instructional Services
Lake Washington Institute of Technology
11605 132nd Avenue NE
Kirkland, WA 98034
shawn.sullivan@lwtech.edu | Direct: (425) 739-8100 ext. 8490
www.lwtech.edu

COUNCIL PUBLICATIONS

NOW AVAILABLE: TRANSPORTATION & LOGISTICS - Q&A IN PLAIN ENGLISH - BOOK X

"Transportation & Logistics - Q&A in Plain English - Book X", the tenth in this series of the Transportation & Logistics Council's popular texts, is now available. See attached Order Form.

SHIPPING & RECEIVING IN PLAIN ENGLISH - A “BEST PRACTICES” GUIDE

Shipping & Receiving in Plain English is a “best practices” handbook for those involved in purchasing transportation and logistics services, contracting with carriers, forwarders, brokers and 3PL’s, managing and supervising the shipping and receiving functions, and handling cargo claims. The author, George Carl Pezold, has essentially put together in one place all the things that you need to know when shipping or receiving goods, with tips and suggestions for “best practices” and references to other available information and resources. See attached Order Form.

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Full page and one-half page ads are now being accepted for the TRANSDIGEST. Reach a highly selective audience with information on your products and/or services at a reasonable cost. Rates are available for 3, 6 or 12 monthly issues, and include both print and electronic issues. For information contact Diane Smid or Stephen Beyer at (631) 549-8984.

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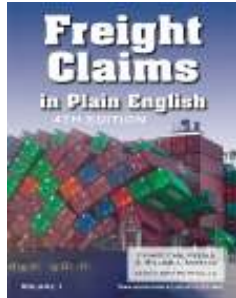
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Freight Claims in Plain English, Fourth Ed.

by George Carl Pezold and William J. Augello



\$285.00

"Freight Claims in Plain English" is now available again in this completely revised and updated Fourth Edition. The text has been expanded to cover many new subjects, recent developments and court decisions affecting transportation in general and claims for loss and damage to cargo in particular, including developments in international ocean and air transportation, intermodal, and cross-border trade with Canada and Mexico.

This Fourth Edition contains extensively revised sections on all aspects of the law and citations to hundreds of new court decisions. The page numbering has been simplified in order to facilitate finding answers to your questions. As with prior editions, a well organized and detailed table of contents, topical index, and table of authorities are included, as well as extensive appendices containing valuable resource materials.

Major topics include:

- SURFACE CARRIER LIABILITY
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2015 PRELIMINARY CONFERENCE PROGRAM
GENERAL SESSIONS AND WORKSHOPS

General Sessions

Transportation Industry Update

Leading representatives from industry and the trade press will provide an overview of critical issues facing the transportation industry - funding for infrastructure, capacity, impact of recent regulatory initiatives and other important current issues.

Law of the Land, Law of the Jungle

A continuation of the ever-popular annual session where "Lawyers Explain the Law, and Businessmen Tell it Like it Is"

Security – Fictitious Pick-Up Thefts – A Threat to Supply Chain Food Safety

Transportation Attorneys Panel

Leading transportation attorneys will address recent court decisions and legislation impacting shippers, carriers and intermediaries - loss and damage claims, freight charge disputes, multimodal issues, liability for highway accidents and other current issues.

Loss Prevention and Mitigation of Damages – Best Practices

Shippers and carriers working together can often avoid transit loss or damage through better packaging, security and communication. And, after it happens, much can still be done to mitigate the loss through repair, reconditioning, re-packaging and salvage, as well as instituting corrective action to prevent future losses. Panelists will discuss "Best Practices" for dealing with common situations, both "before and after" a loss.

Freight Claims – Q&A

Panelists will tackle some of the typical questions submitted to the Council's "Q&A" forum and by the attendees, tell how they would answer them and give suggestions on how to resolve difficult situations. Bring your questions to this session!

Workshops

Contracts & Risk Management - How to cover your bases

Top 10 things to have in a transportation contract to protect your interests – what's covered and why.

Explaining the National Motor Freight Classification

The NMFC is widely used and referred to by shippers and carriers, yet many people are not familiar with its contents. Panelists will explain provisions governing participating carriers, general rules, bills of lading, classification of articles, released rates, specifications for packaging, procedures for freight claims, inspections, and claims for overcharges, unidentified and duplicate payments. Also discussed will be how carrier rules tariffs can supersede NMFC provisions.

Freight Claims and Cargo Insurance

Carriers are subject to differing cargo liability regimes such as Carmack, COGSA and the Montreal Convention, as well as contractual provisions. However, cargo liability policies lack uniformity and do not always provide coverage for the loss. Panelists will discuss "Best Practices" for shippers and carriers: What does the carrier's insurance actually cover and how can a shipper find out? How can shippers and carriers protect themselves against uninsured losses?

Saving Transportation \$\$\$ - Looking "outside the box"

Topics will include shipper tools for better partnerships with carriers; dealing with the capacity crunch and driver shortage, ways to help with carrier retention; private carriage, dedicated fleet or common carrier; truck leasing vs. buying; importance of market testing/benchmarking. Panelists will also discuss the benefits and potential disadvantages of outsourcing functions such as transportation, warehousing and distribution that are outside the "core" business and "Best Practices" for selecting 3PL's, brokers and carriers, and for monitoring service providers.

New Laws and Regulations - Impact on the transportation industry

Recently enacted and proposed federal laws and regulations have a significant impact on the transportation industry. What shippers, intermediaries and carriers need to know about MAP-21, CSA, HOS, proposed FDA regulations, and other regulatory initiatives.

Shipping by Air - Parcel and Air Freight

Air shipments, both domestic and international, involve different laws, regulations, pricing and liability regimes. Panelists will explain the role of air freight forwarders vs. air carriers; air waybills and tariffs (dimensional weight rules, etc.), liability for cargo loss or damage for domestic and international (Montreal Convention) shipments including time limits and defenses; packaging and export regulations.

Reverse Logistics

The logistics involved in handling repairs, replacement parts management, end-of-life manufacturing, returns processing, recycling, order fulfillment and customer service (just to name a few) can be a little intimidating. Panelists will discuss latest management technology, updates on industry trends, and potential outsourcing opportunities.

Meet the Experts – One on One Meetings

Would you like help with a problem or have questions that need answers? Then this session is perfect. A Pre-Scheduled One on One meeting with top transportation professionals will give you an opportunity to ask specific questions or get guidance with a problem. Each meeting will be 10-15 minutes of uninterrupted time with a presenter or panelist of your choice. Sign up at the registration table for your own personal consultation.

2015 TLC 41ST ANNUAL CONFERENCE REGISTRATION FORM

A separate **REGISTRATION FORM** for each person registering is required

	EARLY BIRD SPECIAL (Before January 23, 2015)	CONFERENCE REGISTRATION FEE (After January 23, 2015)
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OPTIONAL SEMINARS – SUNDAY MARCH 22, 2015 (NOT included in Annual Conference Registration Fee above)		
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APPLICATION FOR MEMBERSHIP

Membership in the Council is open to anyone having a role in transportation, distribution or logistics. Membership categories include:

- **Regular Member** (shippers, brokers, third party logistics and their representatives);
- **Multiple Subscriber** (non-voting additional representatives of a **Regular Member** firm); and
- **Associate Member** (non-voting members – carriers and freight forwarders).

All members receive:

- An email subscription to **TRANSDIGEST** (TLC's monthly newsletter) NOTE: There is an additional \$50 annual fee to receive the **TRANSDIGEST** hard copy by First Class mail.
- **Reduced rates** for most educational programs, texts and materials

New Members also receive:

- A complimentary copy of "Shipping & Receiving in Plain English, A Best Practices Guide"
- A complimentary copy of "Transportation Insurance in Plain English"
- A complimentary copy of "Transportation & Logistics – Q&A in Plain English Complete Set of Books 4, 5 and 6 on CD Disk"

All fees are for 12 months of membership in TLC.

If you are not presently interested in becoming a member, but would like to subscribe to the **TRANSDIGEST**, you can opt for a 1-Year/Non-member subscription to the newsletter by making the appropriate choice below.

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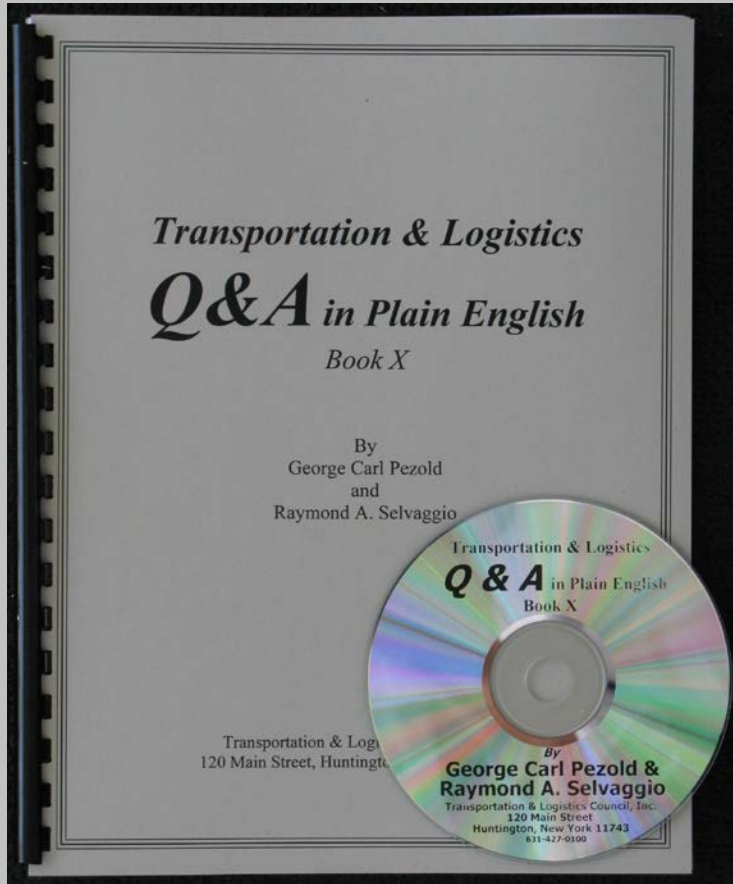
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"*Transportation & Logistics - Q&A in Plain English - Book X*", by George Carl Pezold and Raymond A. Selvaggio, is the tenth in this series of the Transportation & Logistics Council's popular texts, and is a compilation of hundreds of the most recent questions submitted to the Council's "Q&A" forum and published in the *TransDigest*,

What is unique about this compilation of questions and answers is that the questions reflect the **real** problems that actually come up every day, and that the people actually doing the work - shippers, carriers, brokers, intermediaries and even truck drivers - need help with.

The answers range from simple advice to thorough explanations of the legal principles based on the authors' extensive experience in transportation law.

Transportation & Logistics - Q&A in Plain English is excellent resource of advice and knowledge about everyday problems in transportation and logistics, and a great training tool for anyone starting out in the transportation and logistics profession.

Between this new tenth edition and the previous ones, the authors have created a virtual encyclopedia of almost every conceivable question that can come up. You can't find this kind of information anywhere else.

Available now in soft cover (105 pages, with Table of Contents and Topical Index), or on searchable CD (with instructions on "How to Use this CD"). Price: Members \$50; Non-Members \$60 plus shipping and handling. To order, log on to www.TLCouncil.org or call (631) 549-8984.

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EDUCATIONAL MATERIALS

Item		Item#	Price
<i>Shipping & Receiving in Plain English, A Best Practices Guide</i> (2009), by George Carl Pezold	Member	586	\$70.00
	Non	586-NM	\$80.00
<i>Contracting for Transportation & Logistics Services</i> (rev. 2001), by George Carl Pezold	Member	576	\$40.00
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Name:			Position:		
Company Name:					
Address: (STREET ADDRESS ONLY - UPS DOES NOT SHIP TO P.O.BOXES)					
City:			State:	Zip: -	
Phone: ()		Fax: ()		Email: @	

Item #	Description	Qty	Price		Total
			X	\$	\$
			X	\$	\$
			X	\$	\$
Non-members Add Shipping & Handling of \$7.50/item - Outside U.S. Call for Shipping			X	\$7.50 S&H	\$

[MC] [VISA] [AE] Credit Card Information		TOTAL ENCLOSED		\$
CC#		Name on CC		Exp (/)
Address of Card If Different Then Mailing :				