TRANSDIGEST

Transportation & Logistics Council, Inc.

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Register Now for TLC's 42nd Annual Conference

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GUEST EDITORIAL

ELDS: ARE THEY GOOD FOR THE TRUCKING INDUSTRY?

by David W. Fleming
General Manager Transportation Operations
United States Cold Storage Inc.

On December 4, 2015 President Obama signed into law the Fixing America Surface Transportation (FAST) Act. The main component of this five year bill calls for the spending of nearly $300 billion to improve America's transportation infrastructure. Projects such as the rebuilding of hundreds of deficient bridges, repaving thousands of miles of interstate highway, and expanding intermodal terminals are slated to begin as a result of the FAST Act.

Buried in the legislation is a rule that will require nearly every trucking company operating in the US to install Electronic Logging Devices ("ELDs") in all of their vehicles by December 2017. The current President of the American Trucking Associations ("ATA"), Bill Graves, believes that this regulation will "change the trucking industry for the better forever", while another segment of the trucking industry believes that this new rule will do irreparable harm to trucking. Why is this mandate causing such a rift in the trucking industry?

In order to fully understand the current debate over the new EDL mandate, we must first understand what an ELD is, and what it does. ELDs are devices that are connected to a truck's engine for the purpose of electronically logging and monitoring the daily activity of the vehicle and driver. The ability to store and display this information will make manual paper logs virtually obsolete. In fact, the new regulation mandates that ELDs replace paper log books.

While most drivers feel that manually logging their activity into paper log books is tedious at best, some drivers, namely independent owner operators, do not want to give up this practice which by the way has been in place since 1938. These drivers feel that ELDs are nothing but "big brother" monitoring their activities. They also believe that ELDs will lead to a reduction in driver productivity and in miles driven by the average driver, thereby causing drivers to earn less pay.

Conversely, the safety departments of most large trucking companies believe that ELDs will enable trucking companies to once and for all accurately monitor the number of hours their drivers spend behind the wheel. These carriers believe that being able to accurately monitor drivers on-duty time will lead to a less fatigued driver and ultimately a safer driver. This position is supported by the numerous industry studies. For example, according to a study conducted by the Federal Motor Carrier Safety Administration ("FMCSA") the ELD mandate will save 20 lives and prevent 434 injuries annually. Additional studies conducted by the ATA and numerous large trucking companies have reached nearly the same conclusion. Insurance companies have also jumped on the ELD bandwagon, and some are backing up their belief in ELDs by offering lower premiums to carriers that utilize ELDs. (Finally something insurance companies and carriers can agree on!)

Another argument in favor of the ELD mandate is the possible elimination of driver coercion. Author Jeff Head suggests in his book, *Driving Legal Blues*, that owner operators who only drive legally are often penalized by not getting high paying loads, hence they have the "Blues". Mr. Head says that many dispatchers and shippers coerce drivers to "drive illegally or face dire consequences." which leads to fatigued and unsafe driving. He further states that the confusing nature of the current Hours of Service Rules also contributes to errors in log book entries by a certain percentage of drivers. Hopefully having ELDs installed in all trucks will eliminate this type of coercive behavior once and for all, and drivers can now simply tell a coercive dispatcher or shipper that "my ELD won't allow me to drive illegally!"

As noted above, one camp in the ELD debate believes that driver productivity (and compensation) will decrease as a result of the new mandate, and some estimates forecast that it will decrease by as much as 10%. Additionally, Bob Costello, the ATA's Chief Economist, predicts that the trucking industry will have to hire 80,000 new drivers per year just to keep up with retirements and projected growth. The possible decline in miles driven, coupled with the ongoing driver shortage issue will no doubt put extra strain on the supply chain for years to come.

In conclusion, I feel that the potential reduction in driver productivity and the shortage of drivers can be offset if shippers, receivers, and carriers work together to reduce the built in loading and unloading delays that have plagued the supply chain for years. I feel that the positives, such as reduced driver coercion, more accurate record keeping, lower insurance premiums, and most importantly fewer accidents and fatalities on America's highways, will greatly outweigh any negatives that might result from the ELD mandate. Are ELDs good for the trucking industry? I believe the answer is a resounding YES!

ASSOCIATION NEWS

REGISTER NOW FOR TLC'S 42ND ANNUAL CONFERENCE

The Transportation & Logistics Council's 42nd Annual Conference, "Education for Transportation Professionals", will be on May 2 – 4, 2016 and is gearing up to be another great one with lots of educational general sessions and workshops.

RECENT UPDATE: On Sunday, May 1, 2016 in addition to the CCP Primer Class and "Freight Claims", "Contracting", and "Transportation Law" seminars, we are pleased to announce the addition **of two new full day educational opportunities:**

MULTIMODAL TRANSPORTATION OF DANGEROUS GOODS

Presented by Steven C. Hunt, CDGP – ShipMate, Inc.

This course is intended for those persons and facilities that receive, handle or ship dangerous goods (hazardous materials) by surface, air and/or ocean transport. This course fulfills the U.S. DOT's hazardous materials transportation training requirements for: (1) General Awareness and Familiarization; (2) General Safety; (3) Hazardous Materials Security Awareness; and (4) Function-Specific Training for the transportation and pre-transportation functions, such as hazard determination and classification, loading practices, packaging requirements of hazardous materials, preparing & reviewing shipping papers for regulatory compliance, providing & maintaining emergency response information.

Attendees are eligible to take an examination and receive a certification, valid for two years.

The fee for this seminar includes a 165+ page course manual and supplementary instructional materials.

THE NATIONAL MOTOR FREIGHT CLASSIFICATION

Presented by Don Newell, Member CCSB

The National Motor Freight Classification (NMFC) is widely used by shippers and motor carriers to determine freight rates and charges. This seminar will explain what it is and where it came from; how the provisions of the NMFC are developed and published, and how to read, understand and apply the provisions of the NMFC. Also covered will be discussion of provisions governing bills of lading, packaging specifications, rules for classification interpretation and how to use the NMFC to classify your freight.

Registration includes live access to ClassIT Software during the seminar and a 6-month subscription thereafter, which has a retail value of $323.00 per year.

The fee for either the NMFC or HazMat seminars will be $520 for TLC members and $595 for non-members.

WHO SHOULD ATTEND THE CONFERENCE?

Shippers, receivers, vendors, suppliers, 3PLs, risk managers, contract administrators, brokers, carriers, attorneys - anyone responsible for supply chain integrity; negotiating or reviewing logistics contracts, RFP's or rate quotes; shipment security and prevention of cargo theft; resolving freight charge disputes; and processing or recovering loss or damage (OS&D) claims.

Register now for the Conference and take advantage of the **Early Bird Rate** - ONLY $595.00 for members and $745.00 for non-members (after March 1, 2016 registration will increase.)

HOTEL INFORMATION: The 42nd Annual Conference will be held at the Crowne Plaza Albuquerque. A block of rooms have been reserved for April 25, 2016 - May 7, 2016. The special room rate of $109.00 will be available until April 9th or until the group block is sold-out, whichever comes first. Please click here to make your room reservations.

SPONSORSHIPS, DOOR PRIZES & EXHIBITORS

Sponsorships: Among the traditional amenities of the Transportation & Logistics Council's ("TLC") Annual Conferences are the Hospitality Suites on Sunday and Monday night of the Conference. Complimentary hors d'oeuvres and cocktails help create a welcoming atmosphere for attendees, an opportunity to meet both old and new friends, and to network with other transportation professionals. These Hospitality Suites are funded entirely by contributions from our sponsors, and we would like to ask you to make a contribution. We have three sponsorship levels: Bronze $300, Silver $500 and Gold $1000. Your company name will be prominently displayed at the entrance to the Hospitality Suite area, and will be published in the conference program, the TRANSDIGEST and on the TLC website. A sponsorship form is attached, and you can email, fax or mail it to the address on the form.

Door Prizes: Door Prizes can be sent to the TLC office at 120 Main Street, Huntington, New York 11743 or directly to the Crowne Plaza Albuquerque at 1901 University Boulevard NE, Albuquerque, New Mexico 87102. If sending to the hotel please let TLC know.

Exhibitors: See attached information sheet.

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

Conference: For more details regarding 42nd Annual Conference General Sessions and Workshops, visit http://tlcouncil.org/2016_Annual%20Conference.

NEW MEMBERS

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

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CLASSIFICATION

FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD ("CCSB") DOCKETS

	Docket 2016-2	**Docket 2016-3**
Docket Closing Date	March 24, 2016	July 21, 2016
Docket Issue Date	April 21, 2016	August 18, 2016
Deadline for Data/Statement Submissions	May 13, 2016	September 9, 2016
CCSB Meeting Date	May 24, 2016	September 20, 2106

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

AIR

DECLINE IN AIR FREIGHT VOLUMES BOTTOM OUT

According to a January 11, 2016 International Air Transport Association ("IATA") press release, the decline in cargo demand may be bottoming out.

> The IATA released data for global air freight markets showing air cargo volumes (measured in Freight Tonne Kilometers ("FTK") were down 1.2% in November 2015, compared to November 2014. Total cargo volumes, however, expanded compared to October 2015, and were higher than the low point in August.
>
> The negative year-on-year comparisons occurred across all regions with the exception of the Middle East. Of the major markets that together comprise more than 80% of total trade, Europe was down 2.0%, North America by 3.2%, and Asia-Pacific by 1.5%. The comparative weakness in these regions was driven largely because the performance in November 2014 was very strong. Latin American and African markets also fell, by 6.4% and 6.0% respectively. The Middle East region posted 5.4% growth.
>
> "The freight performance in November was a mixed bag. Although the headline growth rate fell again, and the global economic outlook remains fragile, it appears that parts of Asia-Pacific are growing again and globally, export orders are looking better. In fact, the downward trend in FTK volumes appears to be bottoming out. But there is a great deal of uncertainty. The current volatility of stock markets shows how much the health of the global economy – upon which air cargo depends - remains on a knife-edge," said Tony Tyler, IATA's Director General and CEO.

Visit http://www.iata.org/pressroom/pr/Pages/2016-01-11-01.aspx to view the full press release.

POSSIBLE AIR CARGO SURGE WHEN CONTAINER WEIGHT RULE IS ENFORCED

According to a January 8, 2016 article in the Journal of Commerce, the International Air Transport Association ("IATA") will urge member airlines to prepare for a possible surge in air freight volumes caused by possible disruptions when the new ocean container weighing requirements are implemented globally in July.

While the impact is not likely to be as great as resulted from the West Coast Port strike last year, the new regulations for ocean containers could cause a backlog and congestion at ports, with shippers turning to air cargo as an emergency measure to keep their supply chains moving.

See "Container Weighing" article in Ocean section below for a discussion of the new Verified Gross Mass regulation, approved by the International Maritime Organization as an amendment to the Safety of Life at Sea Convention that will be enforced around the world beginning July 1, 2016.

MOTOR

FMCSA PUBLISHES "SAFETY FITNESS DETERMINATION" RULE

On January 21, 2016 the Federal Motor Carrier Safety Administration ("FMCSA") published a Notice of Proposed Rulemaking ("NPRM") in the Federal Register.

According to the summary:

> FMCSA proposes to amend the Federal Motor Carrier Safety Regulations (FMCSRs) to revise the current methodology for issuance of a safety fitness determination (SFD) for motor carriers. The proposed new methodologies would determine when a motor carrier is not fit to operate commercial motor vehicles (CMVs) in or affecting interstate commerce based on the carrier's on-road safety data in relation to five of the Agency's seven Behavior Analysis and Safety Improvement Categories (BASICs); an investigation; or a combination of on-road safety data and investigation information. The intended effect of this action is to more effectively use FMCSA data and resources to identify unfit motor carriers and to remove them from the Nation's roadways.

The big differences in the proposed rule are:

- There would no longer be three safety ratings: satisfactory, conditional or unsatisfactory. Rather, there would only be one safety rating: “unfit.”
- Carriers would be assessed monthly, using fixed failure measures that are identified in the NPRM. Stricter standards would be used for those BASICS with a higher correlation to crash risk: Unsafe Driving and Hours of Service Compliance.
- Violations of a revised list of “critical” and “acute” safety regulations would result in failing a BASIC.
- All investigation results would be used, not just from comprehensive on-site reviews.
- A carrier could be proposed unfit by failing two or more BASICs through:
    - Inspections
    - Investigation results
    - A combination of both

The carriers identified in the Agency’s analysis have crash rates that are more than three times the national average.

Comments are due by March 21, 2016.

Visit https://www.fmcsa.dot.gov/sfd for more information and a link to the proposed rule as published in the Federal Register.

OCEAN

CONTAINER WEIGHING RULE

Is it time for international shippers to panic with the new container weighing rules set to take effect July 1? Officially referred to as the Verified Gross Mass (“VGM”) regulations, they were approved by the International Maritime Organization (“IMO”) as an amendment to the Safety of Life at Sea (“SOLAS”) Convention. The VGM regulations were promulgated in response to the chronic problem of some containers being tendered with gross misrepresentations of their weights, at times causing catastrophic results (see TRANSDIGESTS 166, 172, 188 & 213 for prior reports).

The issues creating the most concern have to do with how the rules will be implemented and how non-compliant containers are to be handled.

The Federation of European Private Port Operators ("FEPORT"), which represents the interests of terminal operators and stevedoring companies at over 400 terminals in the European Union, on January 19, 2016 requested a clarification on implementation of the VGM regulations at national levels. FEPORT noted that while industry actors have released guidelines, "a lack of national guidelines will ultimately lead to confusion in implementation and will have an adverse impact on operations and lead to possible competitive distortion." (http://www.feport.eu/2014-11-18-12-05-27/news/news/225-terminal-operators-request-clarity-on-implementation-of-solas-weighing-rules-at-national-levels).

Examples of variation between industry actors can be seen between the guidance provided by Hapag-Lloyd and port operator APM Terminals. Hapag-Lloyd states that if your VGM is not submitted "A packed container, for which the verified gross mass has not been obtained will not be loaded on the vessel. Loading of a packed container without VGM to a vessel is an offence against an existing SOLAS regulation." (https://www.hapag-lloyd.com/downloads/press_and_media/publications/New_SOLAS_VGM_Rule_%282%29.pdf)

APM Terminals, on the other hand, is proposing to provide container weighing services for shipments where VGM has not been declared, if possible (http://www.apmterminals.com/en/safety/imo-regulations/client-advisory). While this seems to be a practical solution, not all terminals are equipped to undertake this task.

There is also a question of whether or not a terminal should even allow a container in, if it doesn't have a valid VGM. A terminal risks unnecessary congestion if it allows non-compliant containers in, and the necessary documentation does not arrive in a timely manner. Drivers could be stuck with containers they can not offload. Maher Terminals in the Port of New York-New Jersey has stated that carriers must include in their EDI (electronic data interchange) transmission the VGM of the container they receive from the shipper, or be turned away, which is reported to be the position of some eleven other terminals.

There will perhaps be some resolution to this dilemma in the U.S. if the U.S. Coast Guard issues guidelines, which may come in February.

In the meantime, import and export shippers need to review their procedures and anticipate some potential disruption as the new VGM rule is enforced.

RO-RO CLASS ACTION COMPLAINT FILED

On December 29, 2015 a class action suit was filed before the Federal Maritime Commission ("FMC") seeking damages for alleged violations of the Shipping Act of 1984 by 10 roll-on, roll-off ("Ro-Ro") carriers. According to the complaint, filed by Cargo Agents Inc., International Transport Management Corp. and RCL Agencies on behalf of themselves and all others similarly situated:

> Respondents are the largest providers of deep sea vehicle transport services ("Vehicle Carrier Services," described more fully below) in the world, including for shipments to and from the United States. Since at least February 1997, Respondents have conspired to allocate customers and markets, to rig bids, to restrict supply, and otherwise to raise, fix, stabilize, or maintain prices for Vehicle Carrier Services for shipments to and from the United States, pursuant to agreements between and among them that were not filed with the Federal Maritime Commission ("FMC" or the "Commission") and that otherwise violated the Shipping Act and regulations promulgated thereunder. Respondents' conspiracy and agreements caused Complainants and

others who directly purchased Vehicle Carrier Services from Respondents to pay artificially inflated prices.

The complaint was filed against named respondents NYK Line, Mitsui O.S.K. Lines, Ltd., World Logistics Service (U.S.A.) Inc., “K” Line, Eukor Car Carriers, Wallenius Wilhelmsen Logistics, CSAV, Hoegh Autoliners, Autotrans, and Nissan Motor Car Carrier Co., Ltd., and reserved the right to add additional individuals, firms or corporations.

According to the complaint, these carriers transport at least two-thirds of U.S. vehicle imports.

The complaint also noted that various Ro-Ro carriers have already been under investigation by “competition authorities” in the U.S, Canada, Japan and the European Union for anticompetitive practices and that respondents CSAV, “K” Line Japan, and NYK Japan had all pled guilty to criminal actions filed by the U.S. Department of Justice for conspiring to suppress and eliminate competition.

Several civil damage suits also have been filed against Ro-Ro carriers for alleged antitrust violations. Those cases have been consolidated into a single case in U.S. District Court in New Jersey.

Visit http://www.fmc.gov/assets/1/Documents/16-01_complaint.pdf to view the FMC complaint.

PACKAGE EXPRESS

A NEW YEAR AND A NEW FEE! – WILL IT PLAY HAVOC WITH YOUR FREIGHT BUDGET?

by Tony Nuzio on January 6th, 2016
ICC Logistics Services Inc.
Reprinted with permission

The New Year has begun and shippers who utilize the services of parcel giant, UPS will soon start to see a new fee that may be added to their weekly UPS invoices. The official notice of this new fee occurred way back last year, in October of 2015 when UPS announced their 2016 Annual General Rate Increases. The new fee is called ***“Third Party Billing Service”*** and the official description of the fee as described in UPS’ Service Guide is as follows:

Available Options	Description	Fee
Third Party Billing Service	- Effective January 4, 2016, a fee applies to any shipment billed to a Third Party (regardless of the country of origin of the Shipment), and will be charged to the payer. - Based upon all charges including transportation and accessorials. Excludes duties and taxes assessed by government authorities. - Does not apply to UPS Returns® Services or UPS Import Control® shipments.	2.5% of total charges

As a way of clarification, UPS will accept shipments for collect and third-party billing as long as the receiver or third party has a valid UPS account number and has agreed to accept and pay the charges. Unless otherwise specified at the time of shipping, UPS’ shipping charges are always billed to the shipper. One might think 2.5% isn’t a large percentage and that it wouldn’t have a huge impact on a shipper’s annual freight costs. While that may be true, remember this is a new fee that is being charged on top of the General Rate Increases published by UPS which became effective on December 28, 2015. For shippers that receive large volumes of Third Party billed shipments this new increase can have a significant impact on those firms’ freight budgets. Remember the 2.5% fee is based on the total charges for the shipment including the transportation charges, as well as all of the accessorial fees that the shipment would be subject to, including the Fuel Surcharge.

By way of example, one of our clients recently received 285 individual packages shipped to them in one week that was billed to one of their UPS accounts. All of the shipments were billed as Third Party shipments. The total cost for all of the shipments, including freight and all accessorials was $7525.00. That means the additional Third Party billing fees for these shipments would amount to an additional $188.13. Annualized that's an additional $9,782.76 per year that they will now have to budget for, just for that one account, assuming these are regular weekly shipments. The almost $10,000.00 in additional fees is just one aspect of this new fee that shippers will have to deal with.

If a Third Party does not have a valid UPS account and does not agree to accept the charges, UPS will bill those fees back to the original shipper as a chargeback, and will charge the shipper an additional fee of $13.00 on top of the full actual shipment costs. Shippers should make sure before they attempt to make a Third Party billed shipment via UPS in 2016 and beyond, that the intended payer of the freight charges does in fact have a valid account with UPS, or stand the risk of receiving chargebacks from UPS.

Just think about the additional work a shipper will have to deal with if their customers do not have valid UPS accounts, or if the customers refuse to pay the freight costs. These freight charges will then get billed back to the shipper. What if the customer just has an issue with the additional 2.5% fee, what happens then, will they charge back the fee to the shipper? What does this re-billing do to the accounting department's freight accruals and freight budgets? The timing of the chargebacks can sometimes be weeks and in some cases months after the original shipment took place, so you can bet there will be some issues with the "folks in accounting."

So before we get too far into 2016 to determine the full impact this new UPS fee will have, shippers would be wise to take a close look at their weekly UPS invoices to evaluate and determine exactly what the total impact of this new fee will be on their business.

http://www.logisticsstrategies.com/2016/01/a-new-year-and-a-new-fee-will-it-play-havoc-with-your-freight-budget/

QUESTIONS & ANSWERS

By George Carl Pezold, Esq.

FREIGHT CHARGES – TIME LIMITS TO COLLECT

Question: I work for a company that hires 3rd party transportation services for shipping product from production / stocking facility to our customers. We recently went through our accrued transportation account and found several shipments that we were never invoiced for. Can you tell me how long a carrier has to invoice for freight? Some of these are from 2007.

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

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

> by the carrier within 18 months after the claim accrues. [The claim accrues on delivery or tender of delivery by the carrier.]

Note that this does not prevent a carrier from sending a freight bill, but it does provide a statutory defense if the carrier attempts collection.

FREIGHT CLAIMS – TARIFF LIMITS LIABILITY TO FREIGHT CHARGES

Question: I filed a damage claim with a less than truckload ("LTL") carrier in the amount of $3,127.75. The carrier is amending my claim per a Tariff 100 item that states: "entire liability to its customers for damages and shortages in any way related to movement of freight shall not exceed the greater of the shipping charges for the shipments involved or ten (10) percent of the debtor's total freight charges for the immediately preceding twelve (12) months." They then added the freight charges of 3 shipments, totaling $877.

Two of the shipments moved under one account and the 3rd under a separate account. They then took $877 - Total Paid on the other two claims which amended this claim to $359. Is this legal?

Answer: Assuming that the shipment moved under some version of the Uniform Straight Bill of Lading that incorporated an applicable provision of the carrier's rules tariff, the limitation of liability is not "illegal" and probably is enforceable. Unfortunately, since deregulation of the motor carrier industry and the "sunsetting" of the Interstate Commerce Commission, there is no forum to contest such unreasonable practices.

Frankly, I have never heard of such an outrageous tariff provision, and would like to know what carrier has published this one.

FREIGHT CLAIMS – LIABILITY FOR LATE DELIVERY

Question: Is a truck load carrier or a broker liable for loss from a late delivery if noted on bill of lading? Also, what is a reasonable amount of time for a delivery that is not guaranteed and is that in writing?

Answer: A motor carrier is required by law to deliver with "reasonable dispatch". There is no question that delay can cause actual damage, and if so, such damage may be recoverable. As the Supreme Court said in *New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland*, 240 U.S. 34 (1916):

> It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable dispatch is none the less an integral part of the normal undertaking of the carrier.

Reasonable dispatched is defined as "the usual and customary time for similar shipments between the same origin and destination."

However, claims involving delay or failure to make delivery appointments (e.g., chargebacks), and other service failures, often fall into the category of "special or consequential damages."

For special damages to be recoverable, the carrier must normally have actual or constructive notice at the time of shipment of the need to deliver by a certain date and time, the consequences or damages that would result from failure to do so, and the carrier must accept the shipment with that knowledge.

Unless these situations are covered either through the bill of lading or some other communication before tendering the shipment (or in a formal transportation agreement), many carriers will decline such claims.

The law of special or consequential damages is extensively discussed in *Freight Claims in Plain English* (4th Edition) at Section 7.3. You can order a copy through the T&LC website - www.TLCouncil.org.

FREIGHT CLAIMS – ORIGINAL SHIPMENT LOST, THEN FOUND, BUT DAMAGED

Question: We booked a consignment with YRC Freight through "uShip". YRC lost the consignment. We had to order another consignment from our vendor and ship again through another carrier. We filed a claim for the lost consignment through uShip's less than truckload ("LTL") customer service. YRC acknowledged the claim and I even talked to the claims manager. They said they have 120 days to settle the claim. After about a month the consignment showed up at our door and we were now saddled with twice the amount of product we needed.

Anyway, we accepted the product for our future use. Some of the boxes in the consignment were damaged as there was enough evidence of the original packaging having been broken down. The driver signed for the damaged boxes. We were asked to file another claim for damaged goods which was again done with help from the uShip LTL customer service.

Photos were uploaded of the broken boxes and the product has been retained by us from the broken boxes. The freight company, YRC, has now denied the claim on some ground which appears to be some technical jargon. Anyway the matter is that we feel cheated by a carrier as a small business since we do not have the resources to file a suit against YRC. The carrier loses the consignment then delivers late and refuses to refund the freight charged and the goods are damaged. Atrocious!! We will appreciate if we can know what we can do in this case.

Answer: You should have a valid claim for the damage to the original shipment that was later delivered with the damage. This would be the invoice price for the goods that were damaged, less any salvage. Since you accepted this shipment, I don't think you have any other claims for the delay in delivering this shipment since most likely they would be considered "special damages" and not recoverable.

As for your claim for the actual damage, YRC should give you a valid reason for declining the claim. You have not explained why they did this, so I can't advise you whether or not it was a proper declination.

FREIGHT CHARGES – DETENTION CHARGES DUE TO SHIPPER'S FAULT

Question: Approximately five months ago we dispatched two flatbed trucks for a broker which required eight pieces of dunnage for loading per the load confirmation from the broker. Upon checking in, the drivers were given a list from the shipper of the requirements on how to load, and informed that if not followed, the receiver would refuse the load.

According to the receiver's list, eight pieces of 4" x 4" x 8' dunnage were required between each lift of steel plate, which the receiver was to supply at load site. There was no dunnage at the load site, and the shipper told the drivers to use what they could find at the load site, even though it did not meet the receiver's specifications. We requested and received in writing from the broker/receiver authorization to use whatever dunnage we could find at load site.

Unfortunately, through this process drivers and trucks were detained all morning. The loads were delivered and received on time. With proofs of delivery ("PODs") in hand, we billed the broker for detention charges. They are now refusing to pay, stating they did not authorize it.

The broker gave us misinformation about the load. In good faith we dispatched two trucks, our drivers went above and beyond to fulfill the requirements of the receiver, and made the delivery on time with signed PODs.

Your advice regarding collecting the detention charges would be appreciated.

Answer: From your description of the facts the delay was caused because the shipper failed to supply the requested/required dunnage at the load site, and you should be entitled to charge for detention of your vehicle, since it was not your fault.

I would note, however, that in order to charge for detention there must usually be some agreement as to the free time and amount of the charges.

Many carriers have such rules in their tariffs, in which case they are normally enforceable. On the other hand, if you didn't have an agreement or understanding that there would be detention charges, you will probably have a difficult time in collecting.

FREIGHT CLAIMS – VALUE AT STANDARD PRICE OR SPECIAL SALE PRICE

Question: I would like to know the actual amount that a claim can be filed for. We have some big accounts that get special pricing which in some cases is lower than the standard pricing. This is those customers' normal pricing.

Should the claim be filed for only the sale amount lost or can it be filed for the standard price?

Answer: You can only claim for your actual loss, in other words the amount you would have actually received from this customer if the shipment had been delivered in good order and condition.

I would note that there could be special rules if the invoice includes a discount for prompt payment (e.g. 5% net 30 days). Obviously, if the shipment is lost or destroyed, the customer would not be able to take the discount, so the full undiscounted amount would be the measure of damage.

CARRIER AUTHORITY – LEASING ADDITIONAL CAPACITY

Question: We are new to the trucking industry and still growing, and we're looking into leasing a truck to increase our capacity. The guy we have in mind has his own authority, so we would basically keep him busy running his truck. However, he just signed a 12 month contract with a factoring company, so all of his invoices have to be run through them based on what he told me.

So my question is it legal for me to pay him to haul our loads without being a broker? I hope this makes sense but I just want to be sure we are operating legally.

Answer: A registered motor carrier can supplement its fleet by leasing trucks and drivers from an owner-operator (or from another registered motor carrier) - so long as there is a lease agreement that complies with the Federal Motor Carrier Safety Administration ("FMCSA") regulations at 49 CFR Part 376 for the Lease and Interchange of Vehicles.

However, it sounds like you are a shipper and want to use the services of a for-hire motor carrier. If so, they would be acting as carrier, not a broker, and would not need to be registered as a broker.

FREIGHT CLAIMS – CARRIER DEMANDS FREIGHT CHARGES ON LOST SHIPMENT

Question: If freight is lost in transit and never gets delivered, does the carrier have the right to ask for the freight charges to be paid prior to the cargo claim being paid, and then reimbursed (as they do in a damage claim situation)? It seems the contract to pick up and deliver the shipment was breached by the carrier, since a proof of delivery does not exist, and they would not be entitled to collect freight charges. But I have been involved in cases where the carriers still will put these charges into collection and pressure them to be paid.

Answer: There is no law or regulation that requires the shipper to pay the freight charges before the carrier will consider a cargo claim, although some of the larger less than truckload ("LTL") carriers do have such a rule in their tariffs - which could be enforceable.

You are correct in stating that if a shipment is not delivered (lost or destroyed) the carrier does not earn its freight charges since this is a breach of contract of carriage.

I would note, however that you obviously can't include the freight charges in your claim if they have not been paid. If they have been paid, then the claim can be for the invoice (delivered) price.

FREIGHT CLAIMS – RECOVERING LOSS DUE TO CARRIER FAILURE TO PICK UP

Question: If a carrier does not pick up an order and it has to be replaced at a higher rate, are you able to claim the difference in price for lack of picking up the original order?

Answer: In theory, if you had a transportation contract or agreement with the carrier that it would, upon request, pick up shipments tendered to it on a timely basis, it could be argued that failure to do so would be a breach of the contract, and the carrier would be responsible for the resulting damages.

Otherwise, under federal law (the "Carmack Amendment") a carrier is only liable for loss or damage to goods in its possession, so if it never picks up or receives the goods it is not liable for any damages that may be incurred as a consequence of its failure to do so.

FREIGHT CLAIMS – CONCEALED DAMAGE TO CUSTOM CAR HOOD

Question: I received shipment of a custom painted automobile hood. The packaging did not appear damaged and I accepted it from the carrier. I opened it the next day to find damage on three edges of the hood. This was a custom color painted hood and I have no reason to believe the supplier painted and wrapped it damaged or with paint freshly scuffed on the edges or with corners bent. The carrier is refusing my claim of transit damage. What steps or who else can I get involved to find resolution?

Answer: First, the federal claim regulations at 49 CFR Part 370 do require the carrier to "promptly and thoroughly investigate" the facts, not merely disallow the claim because of a "clear" delivery receipt.

Since no damage was reported at the time of delivery this falls into the category of "concealed damage", which means that the claimant does have an additional burden of proof. The basic rules for "concealed damage are that the claimant has to prove that the shipment was tendered in good order and condition to the carrier, and then must prove that the damage existed at the time of delivery, and could not have occurred afterwards.

I would suggest that you obtain a written statement from your vendor or someone that has actual personal knowledge of the condition when the shipment was tendered to the carrier, and also explain how and when the damage was discovered (together with any photos that may have been taken), submit these to the carrier and request that they reconsider their declination of the claim.

FREIGHT CLAIMS – CHRONIC CONCEALED DAMAGE AND SHORTAGE CLAIMS

Question: I'd like to submit a question and would like to know the best possible option in resolving the situation.

I work for a logistics company in which we have about 48 owner operators that haul containers out of the port and less-than-truckload ("LTL") and truckload ("TL") from warehouses to shippers all across the nation. We also use 3rd party carriers to haul loads from the east coast to west coast and vice versa.

On our LTL and TL loads we have been experiencing a lot of shortages and concealed damages to the consignee.

The warehouses that we pick up out of have their generated bill of lading that shows the cases count, item description, lot number, and item number. Due to the method of packaging, sometimes our drivers/carrier can't really verify if there are any concealed damage/shortage of cases. In these situations, when the driver/carrier gets to the consignee and the bill of lading is marked short 1 case or damaged on another, we have to pay the claim to our client.

I'd like to get a better understanding as to how I can fight claims like these with the shipper or my customer.

Answer: Shortages such as you describe can be because the goods were never put on the truck, or were stolen or pilfered while in transit, or occurred after delivery (by some employee of the consignee). You need to identify and keep track of the warehouses, carriers and consignees involved in these claims to determine if there is any pattern of losses, and it may be necessary to involve their security people or hire your own investigator.

FREIGHT CHARGES – APPLICATION OF THE "180-DAY" RULE

Question: Regarding the "180-Day Rule" set forth in a federal statute (49 U.S.C. §13710). Does this rule apply to intermodal carriers, rail, and steamship carriers? If not, is there a similar statute that would apply?

My situation is that we contracted with an agent of a delivery service back in 2014. On September 29, 2014 we timely paid two invoices for their services. More than 6 months later we received an invoice for an additional $1,100.00 for the same shipment, now listing per diem charges that the railway billed the delivery service. Said invoice was dated April 30, 2015 and included charges for $920.00 and for $180.00 for per diem charges for the shipment. Do I have a right to refuse to pay these additional charges after more than 180 days? Thank you...

Answer: The "180-Day Rule" set forth in 49 U.S.C. §13710 only applies to motor carriers and there is no similar time limit applicable to rail or ocean carriers. Whether it applies in an intermodal movement depends on whether there is a through motor carrier bill of lading ("substituted service") or whether the arrangement was with an IMC (intermodal marketing company) in which case there would normally be multiple bills of lading for drayage, rail, etc.

If it is a through bill of lading issued by the motor carrier and the freight charges were billed by that carrier, any "charges in addition to those originally billed" would be subject to the 180-day time limit.

FREIGHT CLAIMS – "LOST" PRODUCT DELIVERED AFTER REPLACEMENT ARRIVES

Question: This is a situation related to a shortage of pallet(s) that crops up from time to time. A shipper ships a pallet of parts to a company that makes motors. The pallet goes missing and does not deliver. After many weeks of searching the carrier states that the pallet is indeed missing and that a claim should be filed for the value of the missing parts. As a result, new parts are manufactured and a replacement shipment sent out on a pallet. A claim is filed with all the required documentation for the original shipment. After the carrier receives the claim, the missing pallet suddenly is found and delivered. The consignee now has 2 pallets of the same parts. (They only needed 1 pallet of parts as this was the final manufacturing "run" on the specific motor they were to be used in.) The carrier declines the claim stating that since the missing pallet was found they incur no liability. Is this correct?

Answer: Carriers are responsible for unreasonable delay, and the *Paper Magic* case is an illustration of a shipment that was "lost" and then "found" some time later. I am attaching an excerpt from *Freight Claims in Plain English* (4th ed. 2009) that discusses the Paper Magic case:

The case of *Paper Magic Group, Inc. v. J.B. Hunt Transport, Inc.*, 2001 WL 1003052 (E.D.Pa. Aug. 29, 2001), affirmed, 318 F.3d 458 (3rd Cir. 2003) involved a delayed shipment of boxed Christmas cards. J. B. Hunt had picked up the shipment on October 16, 1998 at Paper Magic's facility in Danville, PA. The shipment was to be delivered to Target Stores in Oconomowoc, WI.

Typically, such a shipment would have a transit time of two or three days. Unbeknownst to any of the parties, the shipment had been misplaced by Hunt. On February 5, 1999, almost four months after the shipment was picked up, Hunt found the shipment sitting at its Chicago, IL terminal. Both Paper Magic and Target refused to accept delivery of the shipment because Christmas had passed and the shipment was now worthless to both. Thereafter, Paper Magic filed a claim for $130,080.48, which represented the invoice value of the Christmas cards. Hunt was able to salvage the Christmas cards for $49,645.96 and offered this salvage value to Paper Magic as full and final settlement of the claim. Paper Magic refused this offer.

The district court ruled that Hunt's four-month delay in delivering the Christmas cards was essentially a "non-delivery." The appellate court agreed and determined that Paper Magic was entitled to recover its full invoice price. The issue on appeal was whether Paper Magic was seeking special or general damages. General damages are those that are reasonably foreseeable in an action for breach of contract, whereas special damages are not. After briefly recapping the case law lineage of special versus general damages, the Third Circuit held that:

> 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. 318 F.3d at 462.

I hope that this helps to answer your question.

FREIGHT CLAIMS – "ACT OF GOD" DEFENSE

Question: Has there been any investigation into the Norfolk Southern train derailment in Marshall, VA on 9/30/15? The Norfolk Southern is declining freight claims on the basis of "act of God" stating the track was washed out.

They have provided us neither evidence that the track was washed out, nor a copy of their investigative report. The initial reports were that we were able to find on the internet say the derailment was caused by "a pile of crossties laying across the track."

Answer: I am not familiar with this particular derailment, but I do have some comments about the "act of God" defense.

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.

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". These are factual questions that depend on the particular situation. See *Freight Claims in Plain English* (4th Ed.) at Section 6.3 for a thorough discussion of this subject.

This is even more true 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 do recall a case from a few years ago in which the railroad argued that a washout had caused a derailment. Investigation by the Federal Railroad Administration ("FRA") revealed that the engineer had failed to heed warnings to proceed slowly over a creek, and the railroad paid the claims.

I believe that there have also been some other cases in which washouts or bridge failures had occurred a number of times at the same location after heavy rains and local flooding, that it was known to the railroad as a problem area, and that it could have repaired the situation or avoided that route.

I would note that the FRA does maintain detailed records of railroad accidents and derailments, so that you may want to look into this to see if there are other reports about the same location. You can also get weather history for the area from a number of sources through the Internet, including one that I have used -- www.wunderground.com/history.

FREIGHT CLAIMS – LOST GOODS RECOVERED AFTER CLAIM PAID

Question: I have an unusual situation. Would you be able to advise on how to handle this?

In November of 2014 we had a truckload of product stolen. The freight was not recovered and in April of 2015 we received final payment from the carrier for the value of the freight.

On January 19, 2016 we received a call from the carrier informing us that the freight was recovered at a warehouse in MI. The Police are in possession of it, and an estimated 90% of the freight has been recovered.

This is over 1 year after the freight was stolen, plus the carrier has already settled the claim. My question is: Since the carrier essentially paid for the freight by paying the claim, isn't the carrier the legal owners and should take possession of the freight and salvage it to recoup part of their loss? Or is the Shipper still required to take the product back and inspect to mitigate the claim?

The freight in question is not food or pharmaceuticals, however the shelf life of the product is 12 to 18 months.

I appreciate your help with this and please feel free to contact me with questions or if clarification is needed.

Answer: I'm not sure that there is a "legal" answer to your question. Even though the carrier has paid for the claim it doesn't necessarily mean that it "owns" the freight, unless the shipper has released its interest in the goods or abandoned them to the carrier.

Under the circumstances you have described I think it would be the proper procedure for the shipper to authorize the carrier to salvage the goods if possible and to retain the salvage proceeds. (The shipper might want to have the goods marked as "seconds" or distressed merchandise if that would be appropriate.)

I don't think the shipper can be required to take the goods back and be responsible for salvaging them or mitigating the claim at this point.

RAILROADS

NORFOLK SOUTHERN, CANADIAN PACIFIC

Recently (TRANSDIGESTS 213 & 214) we reported on the overtures by Canadian Pacific Railway Ltd. ("CP") to acquire Norfolk Southern Corp. ("NS"). NS has thrice rejected CP's offers and now shippers, lawmakers and other railroads are petitioning federal regulators to reject the merger, even though CP has not even filed any legal notice with the Surface Transportation Board ("STB").

The majority of the objections raised with the STB, which has the ultimate authority over rail mergers in the U.S., raise the concerns that a CP-NS merger would significantly decrease competition in the industry, raise prices for shippers and end-consumers and open the way for a new wave of consolidation. There have been no reported letters in support of the merger.

If CP was successful, this merger would be the first major merger involving a U.S. railroad since the STB rewrote its regulations in 2001, after a wave of consolidation reduced the number of major North American railroads from 35 to just seven.

In an effort to support its position and counter opposition, CP submitted a letter to the Antitrust Division of the U.S. Justice Department, according to a January 19, 2016 press release. The letter asks for a review of recent actions by "a number of major U.S. railroads who have stated publicly that they are organizing a collective campaign to block significant mergers in the railroad industry, including CP's proposed offer for Norfolk Southern Corp."

According to the letter to the STB, CP stated in response to the other railroads collective action:

> They are—with good reason—concerned that the proposed Norfolk Southern acquisition will lead to a more competitive industry: with the combined efficiencies, cost-savings, and the upgraded competitive advantages, the combined companies will be much better positioned to price competitively, improve service quality, and create the type of competitive environment that CP's competitors are afraid of. But fear of competition does not justify the collective action of competitors.[1] As the Department of Justice has said on many occasions, the antitrust laws are designed to protect consumers against unfair actions in restraint of trade, not to protect companies against price and other competition from their competitors.
>
> The collective communication strategy of these competitor railroads is also likely illegal because it is anticompetitive: it is an agreement to collectively work together to prohibit the introduction of competition by a new competitor, which is akin to a group boycott in principle and intended effect. Such conduct is plainly anticompetitive and unlawful.

Visit http://www.cpr.ca/en/investors/cp-asks-doj-to-review-recent-meetings to view the press release and CP letter.

In an effort to further support its position, on January 20, 2016 CP released a white paper asserting that its proposed merger with NS will alleviate congestion in Chicago, a critical freight hub in the U.S. rail system.

Visit http://www.cpr.ca/en/investors/cp-ns-combination-will-ease-congestion-in-key-chicago-rail-hub to view CP's press release and visit http://www.cpr.ca/en/investors-site/Documents/chicago-white-paper.pdf to view the white paper, titled "The Opportunity to Alleviate Congestion in Chicago."

PERSONAL

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CCPAC NEWS

CERTIFIED CLAIMS PROFESSIONAL EXAM RESULTS

Established in 1981, CCPAC is a transportation cargo claim accrediting organization with a global membership and is comprised of shippers, manufacturers, freight forwarders, brokers, logistics companies, insurance companies, law firms and transportation carriers including air, ocean, truck and rail and various related transportation organizations. CCPAC seeks to raise the professional standards of individuals who specialize in the administration and negotiation of cargo claims. Specifically, it seeks to give recognition to those who have acquired the necessary degree of experience, education, expertise and who have successfully passed the CCP Certification Exam covering domestic and international cargo liability, warranting acknowledgment of their professional stature.

The CCP Exam Schedule for 2016: Albuquerque, NM - May 4, 2016; Nationwide – Nov 5, 2016. A CCP Primer Course will be offered on May 1, 2016, the Sunday preceding the Transportation & Logistics Council's 42nd Annual Cargo Claim Conference in Albuquerque, NM.

Additional information can be obtained by contacting John O'Dell, Executive Director of CCPAC, by phone: 904-322-0383 or email: jodell@ccpac.com or visit http://www.ccpac.com/.

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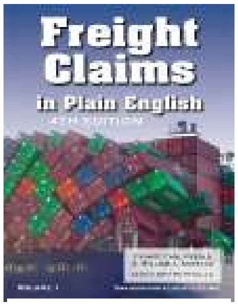
Freight Claims in Plain English, Fourth Ed.

by George Carl Pezold and William J. Augello



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"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:

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

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All members receive:

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- **Reduced rates** for **ALL** educational programs, texts and materials.

New Members also receive:

- A complimentary copy of "**Shipping & Receiving in Plain English, A Best Practices Guide**"
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Transportation & Logistics Council
42nd Annual Conference
Albuquerque, NM
Exhibitor Information

If interested in exhibiting at the Transportation & Logistics Council's 42nd Annual Conference, please contact Diane Smid for further information at (631) 549-8984 or by email to diane@transportlaw.com. The conference will be held from **May 2, 2016 to May 4, 2016** at the Crowne Plaza, Albuquerque, New Mexico. The following is a summary of information about the exhibit program at TLC's conference.

Preliminary Schedule

The exhibit floor is open on Sunday, May 1, 2016 7:00 pm through Wednesday May 4, 2016 12:00 pm

Move In/Set up

Sunday	May 1st	9:00 am – 5:00 pm

Exhibit Hours

Sunday	May 1st	7:00 pm – 9:00 pm	
Monday	May 2nd	7:30 am – 5:00 pm	7:00 pm – 9:00 pm
Tuesday	May 3rd	7:30 am – 5:00 pm	
Wednesday	May 4th	7:30 am – 12:00 pm	

Move Out

Wednesday	May 4th	12:00 pm – 4:00 pm

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Registration list will be provided to exhibitors.

GEORGE CARL PEZOLD, Executive Director
RAYMOND A. SELVAGGIO, General Counsel

Transportation & Logistics Council's 42nd Annual Conference

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"Transportation & Logistics - Q&A in Plain English - Books 7, 8 & 9" is a compilation of the seventh, eighth and ninth books in this series of the Council's popular texts that were originally published in 2009 through 2013. Since these were about to go out of print, the Council decided to re-publish this valuable reference material in a single CD version.

Based on hundreds of actual questions submitted to the Council's "Q&A" forum and published in the TransDigest, these are real questions, from business people – shippers, carriers and logistics professionals – with a wide range of day-to-day transportation and logistics problems. The answers are by George Carl Pezold and Raymond A. Selvaggio, two leading transportation attorneys, and are clear, concise and to the point.

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EDUCATIONAL MATERIALS

Item		Item#	Price
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