TRANSDIGEST

Transportation & Logistics Council, Inc.

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EDITORIAL

ANOTHER "INDEPENDENT CONTRACTOR V. EMPLOYEE" CASE

by George Carl Pezold

The topic of "independent contractor v. employee" continues to come up as states attempt to impose various kinds of wage and hour laws, unemployment insurance and workers compensation requirements, etc. on the motor carrier industry. We recently reported that ABF and ODFL had imposed surcharges on all shipments to or from California in response to a recent change in the state's labor laws.

A recent decision from the U.S. District Court in New Jersey involved two audits by the New Jersey Department of Labor and Workforce Development that found PDX North America liable for $361,378 and $598,850. The audits were conducted pursuant to the New Jersey Unemployment Compensation Law and involved interpretation of the Independent Contractor statute and the Commercial Truck Drivers Exemption, under which the agency determined that PDX owner-operators were "employees" and not independent contractors.

Although its administrative appeals were still pending before the agency, PDX filed a complaint in the federal court against Harold J. Worths, the Commissioner of the Department of Labor and Workforce Development. The complaint alleged the enforcement of the New Jersey laws violated the Federal Administration Aviation Authorization Act ("FAAAA"), which was incorporated into the Interstate Commerce Act at 49 USC 14501(c)(1), and which prohibits the enactment or enforcement of state laws or regulations "related to a price, route, or service of any motor carrier".

The state brought a motion to dismiss the complaint on various grounds. First was the "abstention doctrine", in other words that a court should abstain from taking jurisdiction while there were administrative proceedings still pending. The court rejected these arguments, stating ". . . the only issue presented in this action is a federal one - whether the FAAAA preempts the New Jersey Independent Contractor Statute and the Exemption."

The state then argued that the New Jersey statutes were not related to a price, route or service of any motor carrier. However the court disagreed, stating:

> Here, Plaintiff has alleged, inter alia, that: (1) the application of these New Jersey laws would prevent it from utilizing independent contractors; (2) "requiring PDX to use employees [rather than independent contractors] would force it to establish and maintain an employee workforce to meet peak demand, even when many of the employees would have little or no work at other times"; (3) "PDX also would need to considerably build its infrastructure…and take on a large contingent of employees for the exact same number of deliveries"; and (4) "requiring PDX to convert [its] independent contractor delivery drivers to employees would compel [PDX] to take

> on additional employee-related costs, including state and federal social security taxes and state unemployment insurance tax….[and] would also compel [PDX] to incur enormous expense under the Patient Protection and Affordable Health Care Act." (Compl. ¶¶ 35-38.) Construing these facts in the light most favorable to Plaintiff, the Court finds that Plaintiff has sufficiently alleged that the enforcement of the New Jersey Independent Contractor Statute and the Exemption will substantially affect the prices, routes, and services of PDX with respect to its transportation of property, and thus will violate the FAAAA. *See 49* U.S.C. § 14501. Accordingly, Plaintiff has sufficiently stated a claim for relief.

PDX had also brought a motion for summary judgment based on its preemption argument. While the court found that the allegations discussed above were sufficient to state a claim for relief, and thus prevent dismissal of the complaint, there was not enough factual evidence at this early stage of the litigation to grant its motion for summary judgment. The court directed the parties to proceed with further discovery and essentially invited PDX to quantify how the determination that its owner-operators were "employees" would impact a "price, route, or service" of the carrier.

PDX North, Inc. v. Wirths, U.S. District Court, District of New Jersey, Case 3:15-cv-07011, May 31, 2016.

ASSOCIATION NEWS

NEW MEMBERS

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

Regular Members

Glenn Schicker
Norcell, Inc.
2507 Post Road
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glenn.schicker@norcellpaper.com

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CLASSIFICATION

FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD ("CCSB") DOCKETS

	Docket 2016-3	**Docket 2017-1**
Docket Closing Date	July 21, 2016	December 1, 2016
Docket Issue Date	August 18, 2016	December 29, 2016

	Docket 2016-3	Docket 2017-1
Deadline for Written Submissions and to Become a Party of Record	September 9, 2016	January 20, 2017
CCSB Meeting Date	September 20, 2106	January 31, 2017

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

INTERNATIONAL

"BREXIT"

"Brexit" is a short form for "British exit" from the European Union ("EU"). If you hadn't heard of it previously, you likely noticed when the market took a significant dive on Friday, June 24 after the results of the referendum on whether to leave or remain in the EU were known and Brexit (or leave) won.

It is too soon to know the long term ramifications of this historic vote, but businesses should be aware of what is happening and consider possible implications. A sampling of what we think so far:

- Stock markets around the world have taken a big hit, with uncertainty likely to cause continued volatility.
- It appears unlikely that the Federal Reserve will increase interest rates soon. This affects mortgage and other borrowing rates.
- There have been significant fluctuations in exchange rates, which may hurt or help depending on your situation. The dollar has strengthened, and that can hurt U.S. exports.
- Scotland and Northern Ireland would rather remain in the EU, so may hold referendums to separate from the United Kingdom. Other countries may follow Britain's lead, further weakening the EU.

MOTOR

MORE CALIFORNIA SURCHARGES

by George Carl Pezold

TRANSDIGEST 217 featured an article about ABF Freight System Inc. ("ABF") imposing a per shipment freight surcharge of $5.92 for all shipments in or out of California as a result of recent changes in California labor laws. In TRANSDIGEST 219 we reported that Old Dominion Freight Line Inc. ("ODFL") had also announced a similar surcharge on each shipment in or out of California. ODFL is charging a flat fee of $5.95/shipment.

Now more major carriers have jumped on the bandwagon with similar California surcharges that will impact many thousands of shipments to, from, and between all points within the State of California. Carriers are blaming these on recent legislation and regulations that significantly increase the cost of their operations.

Shippers, receivers and consumers around the country will ultimately bear these costs, and the amounts will surely run into millions of dollars each year. Maybe some well-intentioned legislators will get the message.

Thanks to Bob Walters of Freight Management, Inc. we are providing the latest listing of carriers that have instituted California Surcharges, as well as some of the explanations and reasons given by the carriers.

Summary of California Surcharges

ABF	4/1/16	$5.92 PER SHIPMENT	TARIFF ITEM 162
ROADRUNNER	6/13/16	$6.00 PER SHIPMENT	TARIFF ITEM 310
ODFL	5/2/16	$5.95 PER SHIPMENT	TARIFF ITEM 375
OAK HARBOR	6/13/16	$5.99 PER SHIPMENT	TARIFF ITEM 255
MOUNTAIN VALLEY	12/10/2015	$3.95 PER SHIPMENT	TARIFF ITEM 562
BEST OVERNIGHT	1/1/2015	$5.66 PER SHIPMENT	TARIFF ITEM 395
XPO Logistics	6/6/2016	$5.99 PER SHIPMENT	TARIFF ITEM 246
R&L Carriers	6/1/2016	$6.00 PER SHIPMENT	TARIFF ITEM 755
YRC Freight	7/1/2016	$5.90 PER SHIPMENT	TARIFF ITEM
REDDAWAY	7/5/2016	$5.95 PER SHIPMENT	TARIFF ITEM

Explanations and Reasons Given by Various Carriers:

ABF Freight

We are the first major LTL carrier to implement a surcharge of this nature. However, we believe the entire transportation market have experienced similar increases in costs and may respond through a similar surcharge, adjustments to base rates, or account specific adjustments. Two intra-state LTL carriers, Mountain Valley Express and Best Overnight, implemented a CARB surcharge in 2015.

Below are some costing factors for this new accessorial:

A new California state law, AB 1513, added Section 226.2 to the Labor Code, effective January 1, 2016. This new law imposed significant new burdens on employers that pay employees on a piece-rate basis. Those employers now must a) Pay piece-rate employees for rest and recovery breaks (and all periods of "other nonproductive time") separately from, and in addition to, their piece-rate pay. The new law specifies a formula for calculating the required pay rate for rest breaks; b) Provide piece-rate employees with wage statements that include the employee's total hours of compensable rest and recovery breaks, the rate of pay for those breaks, and the gross wages paid for those breaks during the pay period; and c) List the total hours of other non-productive time, the rate of compensation for that time, and the gross wages paid for that time during the pay period, if the employer does not pay a base hourly rate for all hours worked (in addition to piece-rate wages).

The California Air Resources Board (CARB) has mandated throughout the years compliance with clean air regulations. These regulations have forced carriers to buy CARB compliant tractors at much higher costs to reduce emissions and control other pollutants affecting the quality of the environment. All new tractors purchased by ABFF are California compliant.

Fuel expenses in California are significantly higher than the U.S. National Average. Most fuel surcharge programs use the national average diesel price and applies a uniform surcharge for all areas of the country.

In summary, we need the surcharge on the pro level data to stay relevant for the future. However we elected to roll this out would have been met with some inquiries. I hope to have some color on the two large accounts by weeks end. I cannot make this call as it's a pricing decision. I do have the FMI concerns communicated and we undoubtedly want to strive forward as solid partners.

Chuck Huff
Director of Corporate Accounts
ABF Freight[SM] -- An ArcBest Company

Roadrunner

Good Afternoon....

Our current pricing agreement is subject to the RDFS 100 Rules Tariff.

On Monday, June 13th, Roadrunner Transportation will implement a California Compliance Surcharge of $6.00 on each shipment moving to and from California. The surcharge will help offset higher operating costs, including but not limited to compliance with California state regulations.

RRTS appreciates your business and partnership. This change will further support our commitment to consistent, reliable, on-time delivery services in a very high cost area of the country.

Your feedback and/or questions are appreciated.

Sincerely,
Helen

Helen Thomas
Corporate Account Executive
Roadrunner Transportation

Oak Harbor Freight Lines

Good morning,

Dennis, what's a good time to call you today? Below is the reasoning behind Oak Harbor implemented the California Compliance Surcharge.

Oak Harbor has implemented a $5.99 per shipment California Compliance Surcharge effective Mon, June 13, 2016. This fee applies on shipments originating from and/or destined to CA.

Following are reasons we are implementing this charge:

- Overall increased costs of doing business in CA due to regulatory burdens.
- California Air Resources Board "CARB" regulations, mandates and compliance. Oak Harbor has had to replace tractors and forklifts, before we would have normally, with more expensive equipment to meet air emissions regulations. The vast majority of our new

equipment has gone to CA due to CARB requirements. CARB compliant equipment is more expensive & more costly to operate/maintain.

- CA meal and rest break rules for drivers. Oak Harbor's mileage compensation program, in place before the law, included time for breaks and non-driving time. We now have to pay for the same time on an hourly basis.

The legal landscape in CA, mainly due to new/changing government laws and regulations. Oak Harbor expects to spend, and is spending, significant additional dollars in legal costs as laws and regulations force changes to the way we do business. We are aware that ABF, Old Dominion, XPO and R&L have implemented the same surcharge.

Thank you for your business and understanding and please let me know if you have any questions.

Mike Brooks
Terminal Manager-Los Angeles
Oak Harbor Freight Lines, Inc.

<u>XPO LTL</u> (CNWY 199 tariff)

California Compliance Surcharge Item 246

Shipments originating from and/or destined to the state of California will be subject to a charge of $5.90 per shipment, in addition to all other applicable charges.

Note: This item is effective June 6, 2016.

What changed?
This is a new item – any shipment with an origin or destination zip code in California (inter or intra state) will be charged a flat $5.90 per shipment.

Due to recent California state legislation resulting in added costs to trucks and drivers, Many LTL carriers are beginning to add a California surcharge.

<u>R+L Carriers</u>

Effective June 1 2016, R+L Carriers will institute $6.00 California surcharge on shipments originating or destined to the state of California, including intra-California shipments

Justification of the charge is well documented; a simple Google search will provide numerous articles related to the high costs of operating a business in California:

- Labor costs, including average wages, unemployment insurance, workers compensation insurance
- Energy costs, including electricity, natural gas and transportation fuel
- Litigation costs
- Taxes (CARB)
- Equipment

Other carriers have already implemented this charge in their rules tariff. Please contact me with any questions or concerns

Best Regards,
Ginger Galvez
R+L Carriers Director National Accounts

YRC Freight

Good morning, here is the update on the new California surcharge we will be enacting on July 1, 2016.

Effective July 1, a $5.90 per shipment surcharge will be assessed to all shipments going to, coming from, or travelling within the state of California. This surcharge is driven by increased costs to do business in the state. If you have customers who ship to or from California, you will want to educate them on this change. Here are a few of the highlights of why this charge is necessary:

Equipment and parts | California regulations restrict the average age of line haul tractors. California also requires newer Model Year (MY)engines for Rail and Port activity, forklifts '08 and newer, generator set registration and replacement, retrofitting of older equipment (including trailer skirts, Diesel Particulate Filter (DPFs) on models older than 2007). Yard goats must use propane as alternative fuel, and tire brand requirements also factor into the state's unique restrictions.

Maintenance | State regulations for steam cleaning ($200 per year per truck), waste transport ($5,000-$10,000 per month) and Diesel Particulate Filters (DPFs) add expense to our operation in California. Tractor PMs must also take place every 90 days (compared to 120-180 days in other locations).

Bienniel Inspection of Terminals (BIT) Inspections | These are exclusive to California.

Opacity tests | These smoke tests cost $50-$100 per truck, plus the expense of maintenance for failed tests.

Licensing and registration | Rates are higher than other states (e.g. approximately 60% higher than Ohio).

Fuel | On average, fuel in California costs 4.4% more than in other states.

Michael P. Machnicki
Senior Corporate
Account Executive
YRC Worldwide – Phoenix, AZ

REDDAWAY

Effective July 5, 2016 Reddaway will be implementing a $5.95 California surcharge on all shipments originating from and/or destined to the State of California. This is in addition to all other applicable charges.

The additional cost of operating in the State of California is well documented and it continues to escalate. Broadly speaking the key factors contributing to increased costs in California include, but are not limited to:

* Ongoing legislation impacting employment and labor expense and associated costs to ensure compliance with labor regulations.
* Environmental related laws impacting forklift and tractor/trailer fleet utilization and compliance costs.
* Emissions tractor engine regulations reducing lifecycle of equipment (required to replace equipment before end of useful life).
* Retrofitting requirements on older equipment
o Diesel particulate filters, Trailer skirts, yard tractors to alternative fuel, etc.
o Reduced MPG efficiency due to environmental components
o CARB/BIT inspection fees and compliance costs
o Tire brand requirements and additional regulations
* More expensive licensing and registration expense.
* More litigious legal environment
* Fuel – on average 4.4% higher than other States

Michael P. Machnicki
Senior Corporate
Account Executive
YRC Worldwide – Phoenix, AZ

FMCSA TO REVIEW AND SIMPLIFY REGULATORY LANGUAGE

The Federal Motor Carrier Safety Administration's ("FMCSA") Motor Carrier Safety Advisory Committee ("MCSAC") in June began a comprehensive review of the FMCSA's plain language "guidance documents," aimed at helping carriers, drivers and inspectors interpret the 700 regulations that govern the industry.

MCSAC met June 14-15, 2016:

> to provide recommendations to the Agency concerning implementation of section 5203 of the Fixing America's Surface Transportation Act (FAST Act) to: (1) Prioritize regulatory guidance that should be incorporated into the safety regulations to promote clear, consistent, and enforceable rules; (2) identify regulatory guidance that appears to be inconsistent with the intent of the safety regulations or makes enforcement of key safety requirements difficult; and (3) identify guidance that should remain in place.

FMCSA requested the 20-member advisory committee's assistance in meeting a FAST Act mandate that the agency review the documents. The FAST Act requires that, not later than December 4, 2016 the FMCSA conduct the initial review of all its guidance documents and ensure that they are current and are made readily accessible to the public. The current hours-of-service guidance documents will be the first addressed.

MCSAC includes representatives from trucking, busing, law enforcement, trade unions, driver training schools and public safety groups, and plans to meet again for two or three days in October to prepare its final report.

Visit https://www.fmcsa.dot.gov/regulations/notices/2016-13376 to view the FMCSA notice.

FMCSA TO CONDUCT DETENTION AUDIT

According to the U.S. Department of Transportation's Office of the Inspector General ("OIG") a long-awaited audit delving into the issue of delays commercial vehicles face during loading and unloading is now underway. According to the OIG announcement:

> Commercial motor carriers play an essential role in the Nation's economy. In 2013, over 2.4 million commercial motor vehicle drivers delivered approximately 64 percent of the goods that consumers, businesses, and industries shipped—equal to an annual value of $11.4 trillion. To reduce driver fatigue and fatigue-related crashes, the Federal Motor Carrier Safety Administration's (FMCSA) current hours-of-service regulations limit the number of hours a driver can work per day to 14 hours. However, delays at shipping and receiving facilities during cargo loading and unloading may result in travel delays and lost wages for drivers. Truckers who experience these delays may then drive faster to make deliveries within hours-of-service limits or operate beyond these limits and improperly log their driving time, thus increasing the risk of crashes and fatalities.
>
> The Fixing America's Surface Transportation Act of 2015 (FAST Act) directs FMCSA to issue regulations on collecting data on loading and unloading delays. The FAST Act also directs us to report on the impact of loading and unloading delays in areas such as the economy and efficiency of the transportation system. Accordingly, we are initiating this audit. Our objectives will be to (1) assess available data on motor carrier loading and unloading delays and (2) provide information on measuring the potential effects of loading and unloading delays.

Visit https://www.oig.dot.gov/library-item/33390 to view the OIG announcement and visit https://www.oig.dot.gov/sites/default/files/FMCSA%20Loading%20and%20Unloading%20Delays%20Announcement%5E-6-15-16.pdf to view the memorandum.

TRUCK PASSENGERS MUST WEAR SEATBELTS

On June 6, 2016 the Federal Motor Carrier Safety Administration ("FMCSA") announced that effective August 8, 2016, all passengers riding in commercial trucks will be required to use seat belts whenever the vehicles are operated on public roads in interstate commerce and holds motor carriers and drivers responsible.

According to the FMCSA release:

> "Seat belts save lives – period," said U.S. Transportation Secretary Anthony Foxx. "Whether you're a driver or passenger, in a personal vehicle or large truck, the simple act of wearing a safety belt significantly reduces the risk of fatality in a crash."
>
> In 2014, 37 passengers traveling unrestrained in the cab of a large truck were killed in roadway crashes, according to the most recent data from the National Highway Traffic Safety Administration (NHTSA). Of this number, approximately one-third were ejected from the truck cab.
>
> FMCSA's most recent Seat Belt Usage by Commercial Motor Vehicle (CMV) Drivers Survey, published in March 2014, found that commercial motor vehicle passengers use seat belts at a lower rate (73 percent) than CMV drivers (84 percent). Federal rules have long required all commercial drivers to use seat belts.
>
> "Using a seat belt is one of the safest, easiest, and smartest choices drivers and passengers can make before starting out on any road trip," said FMCSA Acting Administrator Scott Darling. "This rule further protects large truck occupants and will undoubtedly save more lives."

Visit https://www.federalregister.gov/articles/2016/06/07/2016-13099/driving-of-commercial-motor-vehicles-use-of-seat-belts to view the final rule and visit https://www.fmcsa.dot.gov/newsroom/passengers-large-commercial-trucks-now-required-wear-seat-belts to view the FMCSA press release

TRU ARB COMPLIANCE

Transportation Refrigeration Unit ("TRU" or reefer) owners that own model year 2009 units must comply with the California Air Resources Board ("ARB") TRU Regulation's for in-use performance standards by the end of 2016. The ARB has provided the following information:

Model year 2009 TRU engines must comply with the TRU Regulation's in-use standards by December 31, 2016. Purchase orders for compliance equipment (e.g. replacement TRUs) or emissions control technology (e.g. diesel particulate filters) must be placed before the TRU Regulation's purchase order deadlines to qualify for a compliance extension if delivery or installation is delayed until after December 31, 2016. To qualify for this compliance extension, the TRU must be registered in ARB's Equipment Registration (ARBER) system, purchase orders must be placed before the purchase order deadlines, and compliance extension applications must be submitted by December 31st.

The purchase order deadlines that apply to TRUs are:

- For replacement TRUs: August 31st (four months ahead of the compliance deadline); and
- For verified diesel particulate filter retrofits: October 31st (two months ahead of the compliance deadline).

Replacement trailers should be ordered much sooner (i.e. now) due to long lead times and the current manufacturing backlog.

Owners must exercise due diligence in attempting to comply by the end of 2016. Due diligence means conducting the compliance process with a measure of prudence, responsibility, and diligence that is expected from, and ordinarily exercised by a reasonable and prudent person under the circumstances. For example, starting the research, budgeting, and financing well in advance of the compliance deadline, and purchasing the compliance technology by the purchase order deadline. The compliance extension application, with attached supporting documentation that demonstrates due diligence was used, must be received at ARB by December 31, 2016.

One compliance option to consider is hybrid electric TRUs and TRUs equipped with electric standby, which are often referred to as "eTRUs." eTRUs are a compliance option, when used in a way that qualifies as Alternative Technology. For more details about these qualifications, please see ARB's Guidelines for Electric Standby and Hybrid Electric Systems for Alternative Technology Compliance Strategies at: http://www.arb.ca.gov/diesel/tru/documents/guidance_electricstandby_ets.pdf.

In addition to being a compliance option for the TRU Regulation, plugging in eTRUs while at loading docks or parking spots is a great way to reduce emissions, noise, and operating costs. Year five of the Proposition 1B:

Goods Movement Emission Reduction Program (Prop 1B) is offering an option for reimbursement of up to $3,000 per electric power plug installed. Local air districts periodically issue solicitations for Proposition 1B funding. Additional information can be found on the Prop 1B website at: www.arb.ca.gov/gmbond. If you are interested in applying for Prop 1B funds, please send an email to gmbond@arb.ca.gov and include "TRU project" in the subject line. Also, include the number and location of potential plugs and contact information for your company. Prop 1B program staff will compile emails and pass information on to the local air districts.

A list of companies that offer compliance options, including Alternative Technology (eTRU) compliance options, is available at this link: http://www.arb.ca.gov/diesel/tru/documents/control_option_matrix.pdf.

Please be aware that replacement engines may no longer be a compliance option because replacement engines must be cleaner than the old engine being replaced and there is no replacement engine that fits and functions that is cleaner than an MY 2008 engine (see TRU Advisory 13-18, page 7 for more detailed explanation at: http://www.arb.ca.gov/diesel/tru/advisories.htm).

All model year 2008 and older TRU engines (or units manufactured in 2008 or earlier) should be in compliance now. Please note that trailer manufacture year and in-service dates are not used to determine TRU compliance dates. Noncompliant model year 2008 and older TRU engines/units must not be operated in California unless they are brought into compliance immediately.

Where can I get more information?

For general information about the TRU Regulation, the TRU Website is at: http://www.arb.ca.gov/diesel/tru/tru.htm

The ARBER registration website is at: http://www.arb.ca.gov/arber/arber.htm

ARBER Registration Help pages are at: http://www.arb.ca.gov/arber/trureg/trureg.htm

TRU Advisories are listed at: http://www.arb.ca.gov/diesel/tru/advisories.htm

TRU Compliance extension applications are at: http://www.arb.ca.gov/arber/trureg/truextensions.htm

If you have questions about in-use performance standard compliance, registration in ARBER, or in-use compliance extensions, please call the TRU Help Line at 1-888-878-2826 or call 1-916-327-8737.

Background: TRUs are refrigeration systems powered by integral diesel internal combustion engines designed to control the environment of temperature-sensitive products that are transported in trucks, trailers, shipping containers, and railcars. The emissions from these units are a source of unhealthful air pollutants including particulate matter, toxic air contaminants, nitrogen oxides, carbon monoxide, and hydrocarbons, that all pose a potential threat to both public health and the environment. These units often congregate in large numbers at California distribution centers, grocery stores, and other facilities where they run for extended periods of time to ensure their perishable contents remain cold or frozen. These distribution and loading facilities are often in close proximity to schools, hospitals, and residential neighborhoods. In 2004, the TRU Airborne Toxic Control Measure (ATCM) was adopted by the Board to reduce diesel particulate matter emissions from TRUs and TRU gen set engines. Amendments were adopted by the Board in November 2010 and October 2011.

NY REQUIRES "CROSS OVER" MIRRORS ON TRUCKS

While the Federal Administration Aviation Authorization Act ("FAAAA"), which was incorporated into the Interstate Commerce Act at 49 USC 14501(c)(1), prohibits the enactment or enforcement of state laws or regulations "related to a price, route, or service of any motor carrier", there is an exception for regulations regarding safety. To improve safety, states can implement regulations that can impact motor carriers who may not be aware of the local rules.

In January of 2012, New York Vehicle and Traffic Law §375 10-e regarding equipment went into effect (we only became aware of this when a client got a ticket for not having the required mirror) which provides:

> Every truck, tractor, and tractor-trailer or semitrailer combination registered in this state having a gross vehicle weight rating of twenty-six thousand pounds or more, and a conventional cab configuration in which more than half of the engine length is forward of the foremost point of

> the windshield base and the steering wheel hub is in the forward quarter of the vehicle length, whenever operated within a city having a population of one million or more on highways other than controlled-access highways, shall be equipped with a convex mirror on the front of such vehicle or combination of vehicles. When such vehicle or combination of vehicles is being operated, such mirror shall be adjusted so as to enable the operator thereof to see all points on an imaginary horizontal line which: (a) is three feet above the road, (b) is one foot directly forward from the midpoint of the front of such motor vehicle, and (c) extends the full width of the front of such vehicle or combination of vehicles. Provided, however, the commissioner, in consultation with the commissioner of transportation, may promulgate rules and regulations exempting from the requirements of this subdivision any vehicle or combination of vehicles where such commissioner has determined that the use of such convex mirrors would not increase the visibility of persons or objects located directly in front of such vehicle or combination of vehicles.

A violation under this law is considered a "fix it" violation, meaning that a violator will be given one business day to correct the violation and if the violator makes the correction the ticket will be dismissed. The documentation establishing that the violation was corrected needs to be provided to the court before the summons return date. If a violation is not corrected the violator will be subject to a $150 fine (for the first offense) plus court costs.

DAMAGED SHIPMENTS: WHAT YOU NEED TO KNOW (A REFRESHER)

by Tony Nuzio, CEO
ICC Logistics Services, Inc.

One of the major areas of concern for receivers of freight is when a package, packages, or a full shipment for that matter, is delivered in a damaged condition. Who is responsible for the making the owner whole? If a claim needs to be filed, who files the claim? And, what processes and procedures need to be followed to ensure that a claim will in fact be paid.

This scenario has been the topic of discussion for decades and we suspect will continue to be a topic of discussion for decades to come. A critical time in the establishment of a sound argument for a freight claim is when the shipment is being delivered. Many receiving departments are busy from morning till night and sometimes overlook sound receiving procedures. That will surely end up costing their companies considerable dollars in the long run. So we thought it would be a good idea to provide our readers with our Seven Step Process to Ensure Your Claims are Settled Promptly.

1. All shipments when delivered MUST be inspected thoroughly. First of all, does the receiving department actually know what they should be receiving? How many cartons on how many pallets, etc. It sounds like a huge undertaking to inspect all packages whether they are loose or on pallets, but it is a critical step in the receiving process. Do any of the packages look damaged; are there any holes in the boxes? If there are signs of "VISIBLE" damage, the carriers delivery receipt MUST be noted with a clear explanation of the actual damage discovered. Don't be intimidated by a driver who may just want you to sign for the goods without exception, because that should clearly be a red flag.
2. When you find obvious damage, you should open up the packages in the presence of the delivery driver and take a cell phone picture of the damage as "proof" that the damage was discovered at time of delivery and was not caused by the receiver after the driver left. Also be aware that on palletized shipments the shrink wrap and/or bands must be intact and the shrink wrap should be the same on all pallets. If not, be sure to check the pallets with a different shrink wrap or banding as the pallets may

have been re-wrapped somewhere in transit; perhaps even after contents may have been removed from the inner cartons. **NOTE:** Do not sign any delivery receipt ***"received subject to further inspection"*** as this notation has absolutely no value, because **ALL** shipments are subject to further inspection.

3. When product is received damaged the receiver should request an inspection by the freight carrier. This can typically be scheduled on the freight carriers website. If an inspection is requested the receiver should place all of the damaged merchandise in a safe place as close to the receiving area as possible. The carrier should be notified of an inspection request immediately following delivery of the shipment, but no later than the end of that business day. Be aware the carrier may waive its right to inspect the damaged merchandise and in that case the receiver should create its own inspection report which will become part of a formal claim to be filed against the carrier.

4. Some receivers are under the impression that they must file a claim within 15 days after delivery. That may in fact be true with specific express type carriers, but is not the case with motor carriers. The timeline for filing claims is 9 months from date of delivery. It is clear however that a receiver should file its claim as soon as practical after the delivery has taken place. The ***"15 Day Rule"*** as it has become known is an arbitrary timeline when the burden of proof shifts to the receiver to prove that the damage actually occurred while in the carriers' possession when there was no notation of damage at time of delivery; that becomes a very difficult task after 15 days.

5. Receivers are encouraged to accept damaged goods along with any undamaged goods at time of delivery. If on the other hand an entire shipment is deemed to be damaged beyond repair, the entire shipment may be refused. Refusing partially damaged shipments can create a situation where the carrier places the goods in storage and then expects to have the storage bill paid for by the receiver, further adding additional and unnecessary costs. Avoid such situations wherever and whenever possible.

6. When shipments are received in apparent good condition but are later found to be damaged, these damages are referred to as ***"Concealed Damages."*** Concealed damage claims are handled differently by the freight carriers. There is a presumption that the damaged goods are a result of the receiver damaging the goods after delivery. In 99% of the cases the carriers will immediately refuse to pay claims for concealed damages. It's important to notify the carrier as soon as possible when concealed damages are discovered. The longer the receiver waits to contact the carrier, the more difficult it will be to collect from the carrier on these claims. Oftentimes the carriers will propose a compromised settlement offer for concealed damage claims, such as a one third settlement. They reason that the shipper, receiver and carrier each bears one third of the responsibility in those transactions.

7. As stated previously, freight claims MUST be filed within 9 months of date of delivery or no settlement can be achieved. In the case where a complete shipment is never received the timeframe would be 9 months, plus a ***"Reasonable"*** time for delivery. All claims MUST be filed electronically or in paper format. The nine month statute of limitations for filing freight claims is one that the claimant must be aware of because if the carrier does not acknowledge that they received the claim within 9 months they will immediately deny the claim. Make sure you receive an acknowledgement from the freight carrier within 30 days of filing a claim, which is the carrier's responsibility.

Motor Carrier Freight Claims Processing Rules are published in the National Motor Freight Classification for the carriers participating in the NMFC. All shippers and receivers of freight should have a copy of these freight claims processing rules in their possession. So, if you do not have a copy of the rules, reach out to your freight carrier and have them provide you with a copy.

OCEAN

CONTAINER WEIGHING RULE UPDATE

Officially referred to as the Verified Gross Mass ("VGM") regulations, the container weighing rules go into effect July 1, 2016. As we head down to the wire, more terminals and carriers are agreeing to what seems obvious, the use of on-terminal scales. As reported last month, the 19 ocean carrier members of the Ocean Carrier Equipment Management Association ("OCEMA") announced they'll develop a plan to furnish the requisite VGM information needed prior to cargo being loaded onto a ship as of July 1. OCEMA subsequently announced that it "strongly supports the use of on-terminal scales to obtain the verified gross mass of containers, as required by the Convention on Safety of Life at Sea [SOLAS]".

This is positive as most U.S. ports and terminal operators for years have been using on-terminal truck scales to weigh containers in order to meet Occupational Safety and Health Administration safety requirements. The only minor hitch was the question of whether the use of terminal scales was acceptable, or whether the exporters had to sign off on the weights that had been provided by the ports or terminal operators to the shipping lines at the time of loading onto the vessel.

However, thanks to an "equivalency" declaration by the U.S. Coast Guard, which states that there are a variety of paths to comply with SOLAS, it became clear that a third party could submit the VGM on behalf of the exporter. The Coast Guard is the U.S. enforcement agency for the SOLAS regulation.

By next month we should have a rather clear understanding of what sort of trade disruption VGM compliance has caused, if any.

PANAMA CANAL EXPANSION

Above is an aerial photograph of a set of the new expanded locks in the Panama Canal on the right. On the left are the original locks. Besides allowing the passage of larger vessels (13-14,000 TEUs [twenty-foot equivalent units] v. 5,000 TEUs), the new locks use the three reservoirs to the side of each lock to recycle 60% of the water per transit, for a much more efficient use of this resource.

On Sunday, June 26, 2016 there was celebration as the 984 foot "COSCO Shipping Panama" was the first "Neopanamax" commercial vessel to transit the new locks, carrying 9,472 TEUs. This expansion almost triples the capacity of the ships that can transit the canal and doubles the canal throughput.

While authorities anticipate increasing commerce between Asia and ports on the U.S. East Coast, doubts remain that not all those ports are ready to handle the huge Neopanamex-class cargo ships. Net cargo volume through the canal from the U.S. East Coast toward Asia fell 10.2 percent in 2015, according to official statistics. Meanwhile, the Suez recently lowered tariffs by up to 65 percent on large container carriers in an attempt to keep its traffic.

In addition, not all ports are ready to receive and handle these larger ships. One of the East Coast's busiest ports areas are the three Port of New York and New Jersey ("PANYNJ") terminals that are beyond the 83 year old Bayonne Bridge. The bridge spans the channel between Bayonne, N.J., and Staten Island, and is not high enough to allow the larger vessels to pass. PANYNJ announced last year that the project to raise the bridge would be delayed until the end of 2017 because of engineering miscalculations and construction work slowed by inclement weather. Until the project is completed, larger ships passing through the Panama Canal will be unable to visit the three largest PANYNJ terminals located beyond the bridge in the towns of Newark and Elizabeth, N.J.

In response, some carriers are delaying sending larger ships through the canal to the U.S. East coast and others are spending millions of dollars to modify part of their fleet of ships chartered for the Asia-to-East Coast trade so they'll fit under the bridge. Each ship will have its funnel, a tube that discharges steam from its engine, cut down in height, a process that requires the vessel to miss weeks of service.

Carriers would like to boost traffic on direct routes between Asia and the East Coast because they can charge more to carry containers greater distances and save money by piling thousands more containers onto one ship. Shippers would also save because they wouldn't need to book trains or trucks to carry their goods across the country. The cost of shipping a container from Hong Kong to New York rises by more than 50% if it is delivered to a West Coast port and moved overland the rest of the way.

PARCEL EXPRESS

FEDEX DRUG CASE DROPPED

In TRANSDIGEST #197 we reported on the government indictment against FedEx on conspiracy to traffic in controlled substances and misbranded prescription drugs for its' role in distributing controlled substances and prescription drugs for illegal Internet pharmacies from 2000 through 2010. Subsequently, in TRANSDIGEST #198 we reported on the "superseding" indictment claiming FedEx accepted payment for pharmaceutical shipments it knew were illegal, resulting in money-laundering charges. In TRANSDIGEST #205 we reported on FedEx's motion to have the charges dismissed based upon the federal law exemption for common carriers that transport pharmaceutical shipments from regulatory and enforcement schemes.

In March of 2016 most of the charges against FedEx were dismissed by the court due to the Department of Justice's ("DOJ") sloppy paperwork, and on Friday, June 16, 2016 the DOJ agreed to drop the remaining charges.

The judge had warned prosecutors last month that "the case is terminated" if they couldn't produce evidence that FedEx had "knowingly" shipped drugs without valid prescriptions (e.g., Xanax, Ambien and Viagra). The judge noted that the Drug Enforcement Administration appeared "unwilling or incapable" of providing a list to FedEx of illegal pharmacies. He also asked why Justice wasn't prosecuting the United States Postal Service.

The court also noted that as FedEx had argued, the Controlled Substances Act protects "common or contract carriers" that are "acting in the usual and lawful course" of business from criminal liability if they unknowingly transported controlled substances. The only way it could know whether packages it transported included illegal drugs would be by tearing them open and investigating the prescriptions. That was not FedEx's job, that is the government's job.

Visit http://about.van.fedex.com/newsroom/global-english/fedex-announces-successful-conclusion-internet-pharmacy-case/ to view the FedEx press release.

QUESTIONS & ANSWERS

By George Carl Pezold, Esq.

FREIGHT CHARGES – VENDOR FAILS TO PAY CARRIER

Question: We have a contract with vendor "ABC" for our annual supply of garbage containers and parts. They have it shipped to us by another company, "DEF". "ABC" charges us for the merchandise along with the freight charges. We pay "ABC" but they are not paying "DEF".

"DEF" has contacted us to request payment for this shipping. I cannot pay them directly as our contract is with "ABC", but would like to do what I can to see that "DEF" gets payment.

Can you give me some kind of wording to use in an email to both companies?

Answer: I assume that when you refer to "DEF" you mean a motor carrier that delivered the shipment. If so, normally the bill of lading would indicate which party is responsible for the freight charges, e.g., if it is "prepaid" the shipper would be responsible, and if it is "collect" the consignee would be responsible.

I would note that if the bill of lading says "prepaid", and you have paid the vendor for the goods and the transportation charges, you do not have to pay the carrier.

In any event, I would suggest that you first write to the vendor asking it to pay the carrier, and send a copy to the carrier.

FREIGHT CLAIMS – LIABILITY FOR LOSS AFTER DELIVERY

Question: Our manufacturer shipped goods to a job site. The customer agreed to unload the goods and signed for them in December of 2015. We were then notified by the customer that the building was not ready for us to install the product (solar panels). As a matter of fact, we just finished this last week.

The problem is that when we were told we could do the installation five months later, there was a box of materials missing and nowhere to be found. As best we can figure, it must have been destroyed or thrown out. In order to complete this job our manufacturer overnighted the goods for a total fee of $325.00. I told the customer since he signed for the goods and now this job is 5 months later you have to pay for the lost materials. Can you please guide me in the right direction on responsibility? I have a copy of the signed bill of lading from his employee.

I don't believe the motor carrier has any responsibility for the lost merchandise as it was apparently delivered and accepted. But as I mentioned, five months later when we went to do the installation there were missing parts that we needed to get overnighted at a premium fee. It was my thought the fellow who signed the bill of lading from the contractor we were doing the job for should incur theses additional costs. Is that correct?

Answer: From your description of the facts it seems clear that the motor carrier did in fact deliver the goods that were identified on the bill of lading, and that the loss occurred sometime after delivery when the goods were in the possession of the consignee. If so, the motor carrier cannot be held liable for the loss.

You may not be able to find the worker that signed the bill of lading, but the contractor should still be liable for the acts of its employees.

CARRIERS – MISSING CRUDE OIL MYSTERY

Question: I work for a crude oil hauling company and we are running up against a pretty huge issue. It seems we are losing anywhere from half a barrel to just over a barrel (barrel = 42 US gallons) of crude oil on every load we haul. Another company that hauls for the same crude oil marketer only has a loss of about .03%. What should I do as this could truly be the end of my company unless I figure this out?

Answer: Assuming there are no obvious leaks in your equipment, you should check the metering systems at the loading and unloading facilities. While it may be possible, it seems unlikely that this is a commodity that would be subject to theft. Otherwise I don't have any suggestions.

CARRIERS – FAILURE OF CONSIGNEE TO ASSIST DRIVER WITH UNLOADING

Question: Our company contracted to haul a load of trees from California to Oregon with a broker. We were told that the driver would be assisted with the unloading by the consignee. When my driver arrived at the consignee in Oregon he was told that they couldn't go inside our trailer, and that our driver had to bring the load to the tailgate by himself.

Due to the fact that the weight of each tree was about 90 pounds, and they all were double stocked, my driver was not able to move the trees alone. We contacted the broker about it to no avail. The next day the consignee refused the freight and opened a claim.

The broker is now trying to collect money from us due to failure of service. We dispute the collection due to not having appropriate shipping information. Can you tell me who's right in this situation and who's wrong. Thank you.

Answer: You indicated that the shipment was refused by the consignee because the driver was unable to unload the trailer by himself.

I would first question whether the rate confirmation or other agreement with the broker actually stated whether the delivery was to be driver "assist" or driver "unload". If it clearly contemplated that the driver would only "assist" and that the consignee would be responsible for unloading, I don't see how you could be held responsible.

I also question what happened to the load of trees. Were they delivered elsewhere, were they damaged, etc. If so, even though you may not have been at fault for the rejection of the shipment, you still would have a responsibility to mitigate the loss or damage, and could have liability to the shipper if this was not done.

FREIGHT CLAIMS – PROVING LIABILITY ON "STC" SHIPMENT

Question: I have a question regarding "STC" (Said to contain) notation or signing for pallets instead of pieces. Does this notation or situation relieve the carrier of liability with respects to shortage and/or damage making their denial valid?

Our situation is we contracted a common carrier to haul two pallets. The destination notated two cases short and two cases damaged on the delivery receipt.

The common carrier rejected the cargo claim based on the driver signing for two pallets as opposed to individual units.

Answer: When cartons have been counted and loaded by the shipper on a pallet, and then shrink or stretch-wrapped, it is often impossible for the driver to verify the count or condition of the contents. Carriers understandably do not want to take responsibility for a specified number of cartons or any possible damage unless the driver has actually had an opportunity to view the contents of the pallet. Many carriers now direct their drivers to sign only for a pallet count when goods are tendered on shrink or stretch-wrapped pallets. In a way, a palletized shipment is similar to a "SL&C" (shipper load & count) shipment where the shipper loads a trailer or container and seals it.

A notation such as "said to contain" does not relieve the carrier of liability for loss or damage during transit. However, the issue comes down to your burden of proof. In a shortage situation, the claimant has the burden of proving what was actually tendered (number of pieces) to the carrier at origin, and what was actually delivered. Likewise, if there is damage, the claimant has to provide evidence that the shipment was in good condition at origin and was damaged when delivered.

If you do have a dispute, you should provide documentation and a signed statement from the loading supervisor to establish the actual carton count on the pallet in question and the condition of the contents. Likewise, you should get documentation and a signed statement from the receiver of the goods to prove that there was a shortage and/or damage at the time of delivery (and not after). Re-submit your claim with the additional proof of the shortage to the carrier, and request it to reconsider the claim.

FREIGHT CHARGES -

Question: We had a major breakdown (total loss) of a power unit while in transit. We were hauling a temperature controlled load. We notified the broker the truck was down and asked for help to repower the trailer. The broker refused and stated he was going to file on insurance (which no insurance would cover due to reefer unit and cargo still good).

Anyhow we got the truck repowered by sending in another truck obviously the broker knew we were going to be late for delivery as we had to send another truck to pick up the freight. After we delivery the freight now they are holding all our previous invoices to figure out what the charge is. I guess my first question is can they hold previous invoices or deduct from it without our permission since its separate from this current freight and second can they charge a ridiculous amount they stated somewhere around $15,000 or so if our entire freight bill was $6,000?

Answer: There are two questions here.

First, can the broker withhold payment of your freight bills pending resolution of a possible claim for loss or damage to the shipment? The answer is "yes" and there is no law or regulation that would prohibit that. I would note that they do not have any right to withhold payment on shipments unrelated to this incident.

On the other hand, if you are not paid for this shipment you have recourse, namely to bring a lawsuit to collect your charges, since the obligation to pay freight charges is separate and distinct from any counterclaim for loss or damage.

Second, if there was actual damage to the shipment the shipper (or the broker on behalf of the shipper) must file a claim in writing. At that time, your liability would depend on whether the alleged loss or damage occurred while the shipment was in your possession, and the fact that you have the excuse that your truck broke down would not be a defense. Note however that if there was no actual damage to the shipment and they are claiming damages merely for a late delivery, a different set of rules applies. Claims for late delivery are considered "special damages" and require that the shipper prove that damages were "foreseeable" and that the carrier was on notice of the ramifications of a late delivery.

FREIGHT CLAIMS – LIABILITY FOR "MISDELIVERY"

Question: We shipped a package FedEx. The package was delivered and signed for. Now the company is telling us they didn't receive the leather and it was signed for by a person who does not work there. So, who is responsible for the package at this point; the shipper, the shipping company, or the receiver?

Answer: A common carrier has the legal obligation to ascertain the identity of the consignee when making a delivery, and failure to do so would be a "misdelivery" for which the carrier could be liable. Assuming that you can establish, with reasonable evidence that the shipment was negligently given to some impostor or thief, I think the carrier should be responsible. I suggest that you get a written statement from customer and re-submit it to the carrier.

FREIGHT CLAIMS – "CLEAR" DELIVERY RECEIPT

Question: I have a customer that received a shipment that had visible damage but failed to notate damage on delivery on 5/27/16. On 6/22/16 Customer notified our sales damage of damage and sent pictures. Is the carrier still liable for damages?

Answer: The situation you have described comes up fairly often. If the consignee fails to make any notation on the bill of lading or delivery receipt many carriers will automatically decline claims based on a "clear" delivery receipt.

This is not proper, because 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:

> 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.

There is no law or regulation that says a carrier can decline a claim just because of a clear delivery receipt, if it is in fact responsible for the damage.

I should note that with claims of this type, 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, and did not occur after the goods had been delivered. I would suggest that you get a written statement from a person having actual knowledge of the facts to establish that the damage did in fact exist at the time of delivery.

Lastly, under federal law (49 USC 14706, the "Carmack Amendment"), claims can be filed any time within 9 months of the date of delivery.

FREIGHT CLAIMS – LOAD REJECTED DUE TO FOUL ODOR

Question: If a load is rejected at a receiver due to foul odor, but the trailer was willingly loaded by the shipper, would the carrier be liable for the cargo loss or the shipper? The shipper has informed us to destroy the product after their QA department determined to do so. We reached out to our customer to ask if a claim will be filed and they said it was "FOB: Their Dock" so they could not answer that question. Any insight is appreciated!

Answer: You have not indicated whether the substance that caused the odor was present in the trailer when it was loaded, or whether the odor was detectable by the shipper at that time. I suppose that if the odor was detectable by the shipper it could have refused the equipment, and it could be argued that the shipper was negligent if it loaded the trailer with knowledge of the odor.

However, since this was a shipment of food products, the carrier had a higher standard of care and had a duty to provide a trailer that was clean and suitable for transporting food products.

Under the "Carmack Amendment" (49 U.S.C. 14706)

> a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by '(a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods...' Accordingly, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability.

Missouri Pacific R.R. Co. v. Elmore & Stahl, 337 U.S. 134 (1964).

I would think that even if there was some evidence of negligence on the part of the shipper, the carrier would be unable to carry its burden of proving that the sole cause of the damage was "the act of the shipper himself", and would be unable to prove its freedom from negligence.

CCPAC NEWS

CCPAC

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The CCP Exam Schedule for 2016: Nationwide – Nov 5, 2016.

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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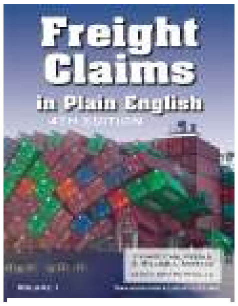

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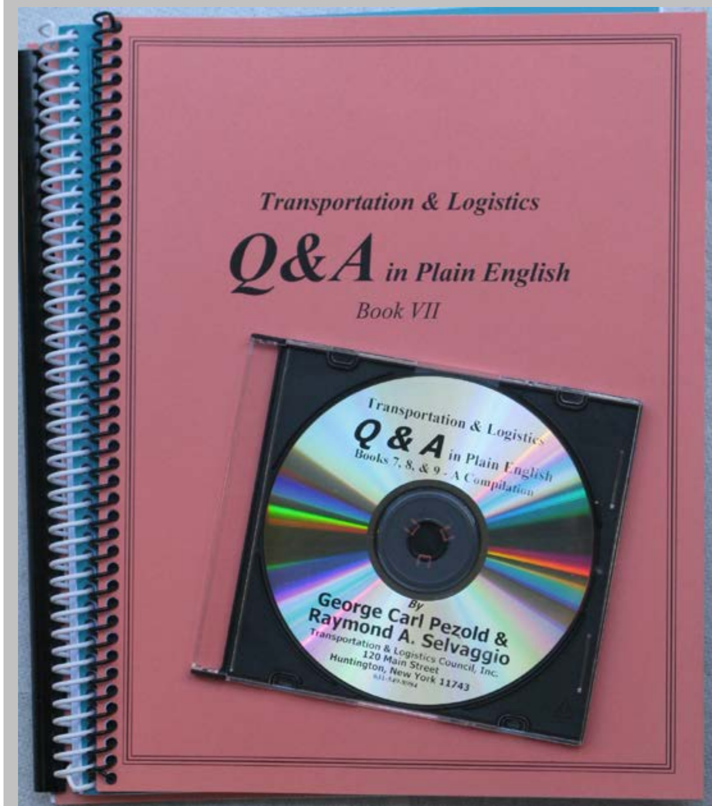

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