TRANSDIGEST

Transportation & Logistics Council, Inc.

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GUEST EDITORIAL

DOES YOUR COMPANY HAVE A FAMILY ATMOSPHERE?

By Grant Ashe, National Sales Manager
L&L Freight Services, Inc.

When I think about companies I have worked for in the past the good memories are the most vivid. Those memories are not about bonuses, incentives, or new customers. The first memories that come to mind are about co-workers and the relationships I built that still remain strong to this day.

The best companies I have worked for and that I have worked with are the companies that have a family atmosphere. It is those companies where people truly care about the happiness and success of their co-workers. It is the work place where you trust the person sitting next to you.

Most of us spend more time with our co-workers during the week than with our families. Why not treat the people you work with like you treat your family? The company I work for now is very much a work family. The two L's in our company name are named after our President's two children. We are some of the first to receive pictures of a co-worker's newborn baby, we know when our co-workers children have a baseball tournament over the weekend, and we send out holiday text messages to one another. Employees can tell that people who work with them care about them, and care about their family. That closeness helps to bring out the best in everyone. We work even harder because of the bond and friendships that have been created inside the office. When a co-worker is out sick or on vacation, we all pick up the slack and make sure that person does not come in the next day or the next week behind and forced to play catch up.

My role as the leader of our Sales Department comes with the responsibility to help grow the company. If I do not come in every week with a positive attitude and a tremendous work ethic, I know that could negatively impact on our company. People could miss out on incentives, family vacations could be affected, and trust in me could be lost. Each one of us has the responsibility to do our job, to meet and exceed goals, and work as hard as we can for the betterment of our company. It sure makes work easier and more meaningful when the hard work you put in is also impacting people you care about, people you have built relationships with, and people you know are working hard for you and your family.

Are you creating the same type of atmosphere at your company? Are you greeting your co-workers with a smile each morning? Do people you work with know that you care about them?

We are the leaders of our respective companies and determine our attitudes. The way we talk with our co-workers, and the way we present ourselves in the office can be contagious to others. If your company does not give off the family friendly vibe only you can turn it around. It will be worth it! Be the person you would want to work for and work with.

ASSOCIATION NEWS

FALL SEMINAR SCHEDULE – SAVE THE DATES

The Transportation & Logistics Council, Inc. is pleased to announce that it will be sponsoring three extremely informative, full-day seminars this Fall on **Freight Claims**, C**ontracting,** and T**ransportation Law**. It's your choice – take all three or choose one or two of the following seminars. They will be held in Elmhurst, Illinois and in Fort Worth, Texas.

Seminar #1

Freight Claims in Plain English, *Presented by Gerard F. Smith, Esq.* Based on the popular 4th Edition of *Freight Claims in Plain English*, authored by George Carl Pezold & William J. Augello, which is often referred to as the "Bible" on freight claims. This is a "soup to nuts" seminar covering a wide range of issues and topics related to freight claims and freight claim recovery, such as the basics of carrier liability for loss and damage to freight in transit, bills of lading, burdens of proof, defenses, damages, limitations of liability, time limits, liability of freight forwarders, intermediaries, warehousemen, air and ocean carriers.

This course is highly recommended for both beginners in the field of freight claims as well as experienced claims professionals. Included in the registration fee, seminar attendees will receive a copy of the 2-volume text, *Freight Claims in Plain English* 4th Ed. (Retail value $285.00).

Member - $550.00, Non Member - $625.00

Seminar #2

Contracting for Transportation & Logistics Services, *Presented by Raymond A. Selvaggio, Esq.* An intensive program on the practical and legal aspects of contracting for transportation and logistics services. Learn different techniques about drafting and negotiating transportation contracts, such as the "do's" and "don'ts" of contracting. Also included is a review of important legal principles, statutes, and regulations affecting the contracting process, as well as a "walk through," in-depth discussion of actual contract provisions, terms and conditions.

This course is for both purchasers and providers of transportation services with a focus on the contractual relationships among motor carriers, shippers, brokers and other 3PLs. Plus attendees will have a unique opportunity to discuss their specific contracting problems and issues with a knowledgeable transportation attorney.

Fee for this seminar includes course manual.

Member - $520.00, Non Member - $595.00

Seminar #3

Transportation, Logistics and the Law, *Presented by Brent Wm. Primus, J.D.* This unique one-day course is designed to provide a basic working knowledge of the laws and regulations affecting the supply chain and governing the relationships between the parties--shippers, carriers, and intermediaries. Topics include critical issues which transportation professionals and attorneys are confronted with in today's environment:

- The Highway Bill (Map-21) and how it affects shippers, brokers and carriers
- Vicarious liability for highway accidents and deaths
- CSA & Safety rating system

- Selecting carriers to minimize risk
- Liability for freight charges and exposure to having to pay freight charges twice
- The elimination of required cargo liability insurance

The text (included with registration) provides vital information you need for minimizing risks and protecting revenues for your organization AND for your own individual professional growth. The text is available in either book or CD format. Please specify which format you prefer when registering. Note: There are limited quantities of either format. If the preferred format is not available we will substitute the other.

Member - $520.00, Non Member - $595.00

LOCATION and DATES

	Freight Claims	Contracting for Transp	Transportation, L & L
Elmhurst, IL	**Monday 10/24/2016**	**Tuesday 10/25/2016**	**Wednesday 10/26/2016**
Ft. Worth, TX	**Monday 11/14/2016**	**Tuesday 11/15/2016**	**Wednesday 11/16/2016**

TO REGISTER: Download the **Registration Form** and, after completing the form, please return it to us by **Fax** at **(631) 549-8962** or **E-mail**.

QUESTIONS? If you have any questions, please e-mail Diane Smid or give us a call at (631) 549-8984.

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

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

INTERNATIONAL

IMPORTERS TO GET SOME TARIFF RELIEF

On May 20, 2016 President Obama signed into law the American Manufacturing Competitiveness Act of 2016 (the "Act") which includes long-awaited amendments to the process for requesting duty reductions under a Miscellaneous Tariff Bill ("MTB"). The Act formally transfers the technical review and management of the MTB process to the United States International Trade Commission ("ITC") and provides mandated timelines, beginning no later than October 15, 2016, and October 15, 2019. The Act thus seeks to ensure that the MTB process will be completed at least twice in the next six years.

The MTB offers U.S. importers the opportunity to persuade the federal government that a raw material or intermediate product they bring into the country should be exempt from tariffs. The ITC will have the final say over whether or not an importer will gain tariff exemptions. A previous version of the bill expired in 2012.

The MTB allows manufacturers to request that the import tariff be temporarily removed on a product they import as long as there is no U.S.-based competitor. For a product to become exempt, the applicants must show that they will benefit by no more than $500,000 a year if the tariff is removed.

The National Association of Manufacturers, which pushed for the enactment of the law, estimated that as a result of the law's expiration in 2012, U.S. companies together paid an extra $748 million in taxes, and its re-enactment will mean the removal of tariffs from hundreds of products and raw materials.

Of note, many companies won't be able to benefit from the law because they import products or materials that have domestic competition.

MOTOR

UNIFIED REGISTRATION SYSTEM EFFECTIVE DATE DELAYED

On July 20, 2016 the Federal Motor Carrier Safety Administration ("FMCSA") announced a three-month extension of its Unified Registration System ("URS"). The new effective date is January 14, 2017, with a new full compliance date of April 14, 2017. According to its announcement:

> The agency is currently updating its information technology systems and undertaking a complex migration of millions of records to remote storage servers. This work will provide the agency and its state partners a foundation to successfully launch the final stage of URS. The agency estimates that the initial phase of URS, launched in December 2015, has saved the industry approximately $1.6 million in processing time during the first six months. To date, FMCSA has issued 62,000 USDOT numbers, removed 340,000 dormant USDOT numbers from agency databases, and screened 100% of operating authority applications for reincarnated carriers.

To view the announcement, visit https://www.fmcsa.dot.gov/newsroom/fmcsa-announces-three-month-extension-unified-registration-system-effective-date and to view the Federal Register notice, visit https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/URS%20Update%20Final%20Rule%20Memo.pdf

FMCSA TO TEST PROCESS FOR DETERMINING CRASH PREVENTABILITY

By Henry E. Seaton, Esq.
Seaton & Husk, L.P

The Federal Motor Carrier Safety Administration ("FMCSA") announced July 7 that it plans to conduct a two-year demonstration program to determine whether certain crashes – those that FMCSA deems as generally "less complex" – are non-preventable and, therefore, should not be counted against a motor carrier's or driver's safety record.

Crash preventability has been a major bone of contention between the trucking industry and the agency since the federal government first began making SafeStat scores public nearly two decades ago. For example, nearly 15 years ago then-FMCSA Administrator Joseph Clapp pledged that the agency would begin assessing preventability and removing non-preventable crashes in a matter of months. A few months later, the agency acknowledged that it could not do so given the huge volume of crashes that would need to be reviewed. In 2014, for example, more than 164,000 DOT-recordable crashes were reported in FMCSA's Motor Carrier Management Information System.

Scope of crashes covered

FMCSA's proposed program would allow carriers and drivers to file requests for data review (RDRs) of the preventability of certain crashes under the DataQs system. However, unlike the normal DataQs process which relies on individual states, RDRs regarding crash preventability would go to a group of reviewers under FMCSA's direct supervision. The public, including carriers and drivers, would be allowed to seek review of the RDR decision using the DataQs system. In a draft Federal Register notice, FMCSA said it has not yet determined whether reviews would be conducted by a dedicated group of FMCSA staff or by a third party under contract to the agency.

The crashes covered by the program fall into two broad categories – those where another driver was convicted of certain specific offenses and those involving single-vehicle accidents under certain limited conditions. A crash would be considered not preventable if documentation established that a commercial motor vehicle (CMV) was struck by a motorist who was convicted of one of four offenses or a related offense:

- Driving under the influence;
- Driving in the wrong direction
- Striking the CMV in the rear
- Striking the CMV while it was legally stopped

For these crashes, the RDR would have to include evidence of a conviction as defined in 49 CFR 383.5 and 390.5 as well as all available law enforcement reports, insurance reports from all parties involved in the crash and other relevant information.

Carriers also could submit RDRs through DataQs when the crash did not involve other vehicles in certain situations, such as crashes in which an individual committed suicide by stepping or driving in front of the vehicle; the vehicle was incapacitated by an animal in the roadway; or the crash was the result of an infrastructure failure.

In these single-vehicle cases, FMCSA said that the RDR must present sufficient evidence that the CMV driver took reasonable action to avoid the crash and did not contribute to the crash. As an example, FMCSA said that if the CMV hit an animal but the driver was speeding or talking on a cell phone at the time, the crash would be deemed preventable.

Possible RDR outcomes

FMCSA proposes three possible decisions on a crash preventability RDR:

1. **Not Preventable** – The crash is removed from SMS
2. **Preventable** – The crash is not removed from SMS for purposes of calculating the Crash Indicator BASIC percentile. However, FMCSA said it is considering options for weighting these crashes based on crash severity or possibly assigning a higher weighting if a crash has been reviewed and deemed preventable. Also, FMCSA plans to retain its current practice that deems any crash as preventable if the carrier, vehicle or driver was in violation of an out-of-service order at the time of the crash.
3. **Undecided** – The documentation submitted did not allow for a conclusive decision. The crash remains in SMS, and the severity weighting is unchanged. Preventable and Undecided crashes would be so designated on FMCSA's website.

As is the case under DataQs today, any intentionally false or misleading statement, representation, or document provided in support of an RDR may result in prosecution and could be punishable by a fine of not more than $10,000 or imprisonment for not more than 5 years, or both.

Next steps

A notice of the proposed program will be published soon in the Federal Register for 60-day public comment. Separately, FMCSA will publish in the Federal Register a notice regarding comments on a crash-weighting analysis it published in January 2015. Links to both documents in draft form as well as answers to frequently asked questions can be found at http://bit.ly/CrashPrevent. Once published, the Federal Register notices will be placed into an existing docket that already includes the results of FMCSA's research on crash weighting and comments on that research. To view that material, visit http://bit.ly/CrashWeight.

Throughout the demonstration program, FMCSA will be collecting data on RDRs, decisions and the carriers that participate in the demonstration program in order to determine:

- The cost of operating the test;
- Future crashes of carriers that submitted RDRs;
- Future crash rates of motor carriers with preventable crashes; and
- Impacts to SMS crash rates.

FMCSA said the analysis will be used to examine the contention that crashes of these types are not the responsibility of the motor carrier, and inform future policy decisions on this issue.

Section 5225 of last year's Fixing America's Surface Transportation Act (FAST Act) requires the agency to task the Motor Carrier Safety Advisory Committee (MCSAC) with reviewing the treatment of preventable crashes under the Safety Measurement System (SMS). But FMCSA's Federal Register notice makes no mention of MCSAC, so it is unclear what role that entity will play in the program. The FAST Act gives FMCSA until December 2016 to task MCSAC with such a review, however.

Visit https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Crash%20Preventability%20Program.pdf to view the Federal Register notice.

TRUCK DRIVER DETENTION

In TRANSDIGEST #220 we reported that the Federal Motor Carrier Safety Administration ("FMCSA") had, as a result of the passage of the Fixing America's Surface Transportation Act of 2015 (FAST Act), been

directed to issue regulations on collecting data on loading and unloading delays. In addition, the FAST Act also directed the FMCSA to report on the impact of loading and unloading delays in areas such as the economy and efficiency of the transportation system. As a result, the FMCSA was initiating an audit 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.

According to two recent White Papers showing survey results from 257 carrier and 50 broker customers conducted by DAT Solutions, "nearly 63 percent of drivers spend more than three hours at the shipper's dock each time they're getting loaded and unloaded, . . Brokers were twice as likely to pay detention fees when reimbursed by their shipper customers, but only 3 percent of carriers said that they were able to collect detention fees on at least 90 percent of their claims."

The DAT Solutions survey results are interesting and support the FMCSA's concern that excessive driver detention time may increase driver fatigue and encourage drivers to violate hours-of-service rules in order to get to a parking spot or a new load. The end result is not just lost money but unsafe behavior leading to accidents.

Visit http://www.dat.com/resources/white-papers/detention-survey-carriers to view the carrier survey results and visit http://www.dat.com/resources/white-papers/detention-survey-brokers to view the broker survey results.

CREATING A ROBUST CONTRACT AGREEMENT

by Tony Nuzio, CEO
ICC Logistics Services, Inc.

Creating transportation contracts that meet the needs of both shippers and transportation service providers equally often times is a complex process. The main reason for the complexity is the fact that in many cases one party is obviously seeking to gain a distinct competitive advantage over the other party. As we have stated in numerous articles in the past on this subject, trying to take advantage of a strategic business partner within a contract arrangement structure is something to be avoided at all cost.

First of all, the main reason for entering into a contract agreement is to provide specific details of the services to be provided and the costs to be paid for those services. Therefore, if the service provider has been properly vetted, meaning they can in fact provide the services spelled out in the contract agreement, then the shipper has accomplished its first goal, selecting the right service provider for their needs. What other advantage could they possibly be looking for? Oh yeah, a much lower rate!

Well, if that's the case then the shipper has not done a good job vetting the service provider. Are there other carriers that can provide the same level of service at lower costs? If so, the shipper should enter into a contract agreement with the service provider who agrees to provide the same level of service at a lower cost. On the other side of the coin, once the service provider has been properly vetted and selected, then the shipper must make a commitment to pay the fees outlined in the contract for the services provided. It really is that simple!

Remember entering into contracts MUST benefit both parties EQUALLY! The main reason for entering into these written agreements is so there is in fact a true meeting of the minds as to what services are to be provided and what fees are to be paid for those services. Contracts are also bi-lateral agreements and therefore both sides must agree to making any changes; changes cannot be made unilaterally by one party or the other. And, finally both parties should ensure what we call "possibility of performance" meaning that both parties can meet their contractual obligations before entering into such agreements.

So now that you have a better understanding of the benefits of contracting for services, we'd like to share some additional points on how to create what we call a "Robust" Contracting Process! To ensure that all of your contract agreements are "Robust" contractual agreements you must ensure they meet the following principles.

- **R**esults Oriented: Both sides must ensure that the contract produces the results BOTH sides intended it to produce. This is a fundamental goal of contracting to make sure there is always a "meeting of the minds."
- **O**ptimizes Resources: The contract should provide assurances to both parties that it makes the best possible use of resources of both parties in the contract agreement. It must also ensure that one of the parties is not being overly burdened or marginalized by the contract terms and conditions.
- **B**alanced: All inputs, outputs and costs are appropriate for the intended result. Simply put, is the service worth the fees being assessed? Are the fees sufficient to properly compensate the service provider for the services it is providing?
- **U**ser Friendly: Is the contract language structured properly so that both sides clearly understand their obligations set out in the contract agreement?
- **S**imple: Are the obligations of both parties clearly spelled out in the agreement so that there are no misconceptions, or assumptions on either side? Is the contract easy to understand to ensure that both sides are guaranteed to meet their contractual obligations?
- **T**rackable: Are there specific provisions in the agreement for quantifying results and monitoring the success of the agreement? Both sides must feel comfortable that all provisions in the agreement are properly monitored and that both sides agree to the tracking and reporting metrics?

And one final thought. If you are a shipper and have a "contract" with your transportation and logistics service provider and that service provider maintains the ability to unilaterally change the rates and/or any other provisions of the agreement without your consent, you DO NOT have a contract, you merely have a pricing agreement. Pricing agreements are not necessarily a bad thing. But, if you're looking to control your rates and services from constantly being changed without your approval, you need to speak with your attorney about setting up contracts with your service providers.

CALIFORNIA PORTS TO INCREASE TRAFFIC MITIGATION FEE

On July 2, 2016 the West Coast Marine Terminal Operators Agreement ("WCMTOA") announced an 8.1 percent increase in the Traffic Mitigation Fee ("TMF") at the Ports of Los Angeles and Long Beach, scheduled to take effect on August 19, 2013. The increase will sustain continued operation of PierPass OffPeak gates amid labor cost increases. According to the announcement:

> Beginning August 19, the TMF will be increased by $5.00 per TEU (twenty-foot equivalent unit) to $66.50 per twenty-foot container or $133.00 per forty-foot container. The current TMF rates are $61.50 and $123.00 respectively.
>
> Since 2011, WCMTOA has been adjusting the TMF annually based on changes in maritime labor costs. In May, the Pacific Maritime Association, which negotiates and administers maritime labor agreements with the International Longshore and Warehouse Union (ILWU), announced an 8.2 percent increase in wages and benefits for the 2013-14 contract year.
>
> The Traffic Mitigation Fee helps pay for the night and Saturday marine terminal shifts created by the PierPass OffPeak program to relieve daytime congestion in and around the ports. It also

provides a financial incentive to move cargo during less-congested times. The TMF is charged for non-exempt containers moving during peak hours (Monday through Friday, 3 a.m. to 6 p.m.).

The terminals have operated the OffPeak gates at a loss since the program's start in 2005, when they doubled the number of shifts per week, spreading the same number of containers over twice the working hours. Cargo volume since 2005 has been flat. The shortfall between TMF revenues and OffPeak gate costs was $66 million in 2012, $55 million in 2011 and $52 million in 2010. For more financial information about the program, please see http://goo.gl/JiTaf.

Before PierPass was created in 2005, the ports and nearby roads were gridlocked, ships were backed up in the harbor unable to unload, and cargo owners suffered long delays in receiving and shipping vital goods. Over the past eight years, PierPass OffPeak gates have grown to handle approximately 55 percent of all container traffic at the ports, accommodated more than 23 million truck transactions, and greatly eased congestion on city streets and nearby freeways during daytime business hours.

"OffPeak is one of a series of programs by port stakeholders that have greatly reduced congestion and air pollution around North America's busiest port complex," said Bruce Wargo, president of PierPass, the not-for-profit company that runs the OffPeak program. "The program adds to the tremendous competitive advantage held by the Los Angeles / Long Beach port complex, which has the most concentrated set of assets of any port in the country, has a workforce that's ready, available and flexible, and has made remarkable strides in mitigating impacts on local communities."

Visit http://www.pierpass.org/news/marine-terminal-operators-at-the-ports-of-los-angeles-and-long-beach-to-adjust-tmf-on-august-19/ to view the announcement.

CARRIER AVOIDS DRIVER MISCLASSIFICATION FINES IN BANKRUPTCY

The issue of whether a driver is an independent contractor or employee has and continues to plague the trucking industry. While the owner-operator model is and has been used in many situations, the cost to a purported employer when supposed independent drivers are reclassified as employees can be devastating with huge potential fines.

Trucking companies often prefer the independent-contractor model because it frees them from having to provide assets, maintain those assets and pay worker medical and retirement benefits. Independent contractors, by law, can not be organized into unions. Unions prefer that workers be classified as direct employees because they are then free to attempt to organize the workers. State agencies generally prefer the employee model as well because it generates greater tax revenues.

The independent-contractor, or owner-operator model, has dominated harbor drayage since the trucking industry was deregulated in 1980. Drivers purchase the trucks, usually used trucks, pay the fuel, maintenance and insurance costs, and sign independent contractor contracts with the drayage companies. The companies negotiate freight rates with beneficial cargo owners and shipping lines, keep a percentage of the freight rate for administrative costs and pass on most of the revenue to the owner-operators.

This model has been challenged many times and drayage operator Total Transportation Services, Inc. ("TTSI"), one of the largest drayage and logistics providers servicing the ports of Los Angeles and Long Beach, was just another trucking company that was found to have misclassified its drivers as independent contractors and faced hundreds of thousands of dollars in fines. The good news is that TTSI sought bankruptcy protection and as of July 20, 2016 received approval of its reorganization plan. For TTSI, this development means that it can continue to operate in Los Angeles-Long Beach after wiping the slate clean.

Driver claims that it could not settle with the individual drivers and attorneys went away after a date specified by the bankruptcy court. TTSI now operates under a different model, using licensed motor carriers.

The misclassification issue was exacerbated in California after its implementation of the clean-truck program in 2006 when the ports banned polluting pre-2007 model trucks from the harbor. Prior to that date, drivers could buy older, high-mileage used trucks for $20,000 or less. With the new clean truck regulations, drivers needed new trucks that cost upwards of $100,000. Unable to afford or qualify for large loans, some trucking companies, like TTSI, secured the new trucks and leased them back to the drivers in "lease-purchase" agreements. This arrangement often resulted in a "misclassification" suit since the drivers did not initially own the assets and the trucking company could exert control over the drivers, who still had to pay the lease as well as fuel, maintenance and repair, insurance and so forth, without receiving the benefits of direct employment.

Trucking companies should review their arrangements with drivers to clarify the relationship in the context of state and federal laws. Both employee-based and independent-contractor based business models are valid and have their place, as long as they can be supported by the facts.

NATIONAL TRANSPORTATION ATLAS DATABASE

The U.S. Department of Transportation's Bureau of Transportation Statistics ("BTS") released the 2016 edition of the National Transportation Atlas Database ("NTAD") at the end of June, 2016. The NTAD is a compilation of datasets representing the nation's transportation infrastructure, including more than 500,000 miles of roadway, over 600,000 bridges, and in excess of 19,000 airports. According to their announcement:

> This year's NTAD consists of over 60 individual data layers, most of which have been updated within the last year. The NTAD also includes several new features: the U.S. portion of the North American Rail Network, truck parking, and road and airport noise layers. The 2016 NTAD marks the end of the traditional annual update. BTS will now begin using a dynamic publication cycle, making updated data available throughout the year, allowing for more timely delivery to users. Also new this year, NTAD will be available exclusively online.
>
> To offer larger and more complex data sets and enhanced functionality, DVDs have been eliminated. The enhanced online NTAD datasets allow for customizable downloads and APIs. They are available as GeoJSON and GeoServices (REST) services and are also available for download as shapefiles, kml and csv files.

Visit http://maps.bts.dot.gov/ to access the database.

OCEAN

CONTAINER WEIGHING RULE UPDATE – TEMPEST IN A TEACUP?

Officially referred to as the Verified Gross Mass ("VGM") regulations, the container weighing rules went into effect July 1, 2016. After much consternation and hand wringing, it appears that most terminals and carriers ultimately agreed to the obvious, the use of on-terminal scales where available and as needed. Almost a month into the new regime, significant disruptions were negligible and generally only complaints about VGM processing fees reported.

One of the more common complaints concerned the imposition of VGM fees at some ports around the world. In India, the government told terminals to stop charging VGM processing fees on containers that

arrive with a shipper-supplied VGM. Apparently shippers were being charged for VGM verifications when terminal operators had not been authorized by the Indian Directorate General of Shipping to offer on-site container weighing services at a fee.

One terminal accounting for roughly 40 percent of the containerized freight passing through India's biggest container gateway, was reportedly collecting Rs. 1,805 (about $28) per 20-foot-equivalent unit and Rs. 2,708 per 40-foot-equivalent unit for providing a VGM. In response to an inquiry, the terminal said these charges are levied only on containers that are found to have discrepancies between the shipper-supplied VGM and actual weight obtained at the terminal in excess of the 1,000-kilogram (2,204-pound) tolerance threshold mandated by the Indian government.

If true, that procedure would be in line with other terminals around the globe, such as those in the U.K., as well as some large non-vessel-operating common carriers. While shippers have grown frustrated with VGM-related fees, some forwarders argue the fees are justified because keying in the added data takes time and puts them on the hook for any accidents since they are acting as the shipper of record if there is a weight discrepancy.

Other ports and terminals had to figure out how to deal with missing or incomplete VGM data, and justify their charges for the efforts they have to undertake to obtain the VGM data and keep the freight moving. Otherwise, most reports were that implementation proceeded without incident around the globe.

OCEAN CARRIER RATE INCREASES

It's that time of year when ocean carriers announce general rate increases ("GRIs") before the peak shipping period begins.

Orient Overseas Container Line (:OOCL") announced it will implement a "rate restoration program" on Asia-Europe trade and effective August 1, 2016 it will be implementing an $850 pre twenty-foot equivalent unit ("TEU") on the Asia to North Europe, the Mediterranean and the Black Sea.

Other shipping lines to announce August 1 rate increases are CMA CGM, which has informed the market of its intention to implement its rate restoration program of $600 per TEU on Asia-North Europe, and Hapag-Lloyd said it will increase its FAK (freight all kinds) rate on the Asia-Europe and Med trades by $1,150 per TEU and $2,200 per 40-foot-equivalent unit.

The problem for carriers is that spot rates are often significantly less than announced rates, and with a glut of capacity in the market, it may be difficult for carriers to actually get the increased rates.

And speaking of capacity, liners have been deploying mega-ships with upwards of 18,000 TEU capacities, and may even utilize larger ships in some routes. At some point, the economies of scale and the law of diminishing returns will determine just how big is actually practical.

PANAMA CANAL EXPANSION

Last month Panama celebrated the opening of its new set of locks, expanding the capacity of the Panama Canal. Not without controversy, one of the major concerns was the decision to use tugs to move the massive vessels through the locks rather than the electric locomotives (called "mules") that are used on the old locks to move and secure vessels.

The issue appears to be that the design for the new locks may actually be too small for the tugs to safely escort the larger ships. There is not enough margin for error in the locks, especially in windy conditions and tricky currents. The mule system used on the old locks provided a very secure and precise means to move the vessels in close quarters, but was considered too expensive for the new locks.

The tugboats themselves are a problem, especially the 14 new boats purchased from a Spanish company, mostly for the expanded locks. To maneuver safely, they must be precisely controlled, but according to captains, they are so unstable that they operate best going backward, something that cannot be done while towing ships through the canal.

While it is not clear whether the accident suffered by the 8,500 TEU (twenty-foot equivalent unit) containership MV *Xin Fei Zhou* was a result of the new tug system, the vessel scraped the side of the lock during a transit and put a gouge in the side of the vessel.

Another concern relates to the increased need for water to operate the new locks. While designed to recycle much of the water, the new locks increase the overall consumption from a finite resource, Lake Gatun. Without adequate rainfall, the Canal Authority will be forced to limit vessels to reduced drafts, with commensurate reduction in the cost efficiency of using larger vessels.

Time will show whether and which problems can be resolved.

Visit http://www.nytimes.com/interactive/2016/06/22/world/americas/panama-canal.html for an in depth review of the canal expansion project.

The five-year, over $5 billion project, is captured in a fun 2-minute time lapse video available online at http://gcaptain.com/videp-panama-canal-expansion-construction-in-2-minute-time-lapse/.

QUESTIONS & ANSWERS

By George Carl Pezold, Esq.

FREIGHT CLAIMS – PARTIALLY DAMAGED SHIPMENT

Question: We have a claim on a load that was picked up in apparent good order and was damaged at destination. The carrier stated that the load was improperly loaded. We are stating that the carrier is responsible for the correct loading and transportation of the freight. The claim is for $4,200. The carrier has offered $2,200 but we are asking for the full $4,200. They are basing their settlement on a dollar amount per pound for the damaged portion of the shipment. Your thoughts please.

Answer: Apparently there are two issues here: (1) whether the shipper's loading was the cause of the damage, and (2) whether there was only a partial loss (damage to part of the shipment).

(1) Under the "Carmack Amendment", the "act or default of the shipper" is a defense to carrier liability, but only if the carrier can prove that it was free from any negligence. This would not apply if the carrier loaded the trailer.

(2) If there was only a partial loss, the amount of the claim would normally be based on the weight of the part lost or damaged, as a percentage of the total weight of the shipment.

Question follow-up: Just to confirm, so if there is partial damage to the freight, the carrier is not liable to cover the cost of the replacement of the damaged freight?

Carrier is advising they are only legally liable to pay .50 per lb. Is that correct? We are requesting for them to pay the full amount for the replacement of the freight, they are only willing to give half.

Answer Follow-up: Your comment follow-up raises another question - whether the carrier has a limitation of liability for $.50 per pound. This would depend on whether the bill of lading that was used incorporated a valid limitation of the carrier's liability in its rules tariff that was applicable to the type of goods that were shipped. You should ask the carrier for a copy of the tariff or whatever they are basing their position on that their liability is limited to $.50 per pound.

Just to clarify the math, the carrier is only obligated to pay for the portion of the shipment that was damaged, but absent a valid limitation of liability, the carrier is obligated to pay the full amount for the replacement of the freight that was damaged.

LIABILITY – OBLIGATION TO PAY FOR GOODS WHEN ERRONEOUS PO#

Question: Basically, my question involves a less-than-truckload ("LTL") carrier who received a shipment through a pool distribution, then they miss-typed the Purchase Order number ("PO#") on their delivery receipt ("D/R"). The consignee accepted the shipment, signed the D/R, but now declines to pay shipper because the proper PO# was never received.

What obligation is the LTL under?

Answer: Other than having the LTL carrier confirm to the consignee that its entry on the delivery receipt was incorrect, and that the proper goods were in fact delivered, I don't see that it has any further obligation. Since you indicate that the proper goods were received by the consignee, they should pay for them.

FREIGHT CHARGES – LIABILITY FOR SHORT DELAY ON CROSS-COUNTRY LOAD

Question: There is a claim being processed against my company for not delivering their load on time and they claim we had poor communication between my driver, dispatch and the broker. They are claiming that the charges will potentially be equal to or be greater than what the truck was paid to run the load. So in other words, we are potentially not going to get paid or we are going to owe them money for running 2,427 miles from Pennsylvania to California.

There were in fact several setbacks and mishaps during the run of this load, such as a radiator breaking and a Department of Transportation ("DOT") inspection that put my truck out of service. I did in fact let the broker know and sent him proof that we were put out of service. My driver was in communication with the delivery site and explained to them that he would not make it on Friday and that he would be there Monday morning.

I would like to see if you can orientate me and let me know what my legal rights are regarding getting paid for this load or will I have to take a loss.

We were delivering steel beams to a construction site. The load was delivered in good condition and signed by the consignee.

Answer: Unless there are special circumstances, such as a contractual agreement to deliver by a certain date and time, together with actual notice of the consequences or damage that would result from failure to deliver on time, the carrier only has an obligation to deliver with "reasonable dispatch". It would seem that a delay of a day or two on a shipment from Pennsylvania to California would not be "unreasonable".

Unless you had either a contractual agreement, or were clearly on notice that the delivery had to be made on Friday, e.g. because there was a construction crew standing by to install the beams, etc., I don't see how you would be liable for any damages for the short delay. And, if the delivery was completed and accepted by the consignee you should be entitled to payment for your freight charges.

CARRIERS – PROOFS OF DELIVERY

Question: What is our obligation as a carrier to provide the shipper with a proof of delivery ("POD") if they are not our customer?

Answer: If they are the shipper named on the bill of lading I would think they are entitled to know that their shipment was delivered.

LIABILITY – CARRIER SUFFERS IDENTITY THEFT

Question: My husband's small company (4 trucks and trailers) transports refrigerated goods. About 8 weeks ago we received 2 letters from different legal offices offering to help us with our matter. I ripped them up and tossed them in recycling thinking it was just advertising. But some days later my husband was arguing with a dispatcher regarding a damaged load totaling to just under $50,000.

The broker is suing us, but we never had the load in our possession, we never asked for the load, nor did we agree to any contract for this load. They faxed him a copy of the confirmation page with dispatcher notes and advances given to the driver. Problem is that on it, it has our company's motor carrier ("MC") number. As for the other information, the dispatcher's contact, the driver, and the company telephone number are not even ours. The signature on the page isn't from anyone at our company.

They threatened my husband with holding any pending or future settlements and even involved our factoring company. They said that no one could have known the MC NUMBER, only us, and said that we were liable.

Since the factoring company had paid out around $20,000 on our regular invoices they also turned on us and said we not only owed the broker, but the factoring company also. All payment due are on hold and we had to make a payment arrangement to repay the $20,000 to our factoring company. We are just about penniless and I'm ready to convince my husband to give up. The broker is a large company. Is there any way we can fight such a big company?

I mean we had no involvement with load and now I'm asking for personal loans and even family just to cover our company's debts and pay drivers. I have had to sell whatever jewelry and my belongings with value just to pay our personal bills and rent and groceries. Please answer and settle my mind. I always say never give up hope, but mine is now barely a speck of HOPE.

In advance I thank you for any answer given.

Answer: You have apparently been the victim of what is called "identity theft" - someone posing as your company. The broker is incorrect regarding your MC Number, it is public information readily available.

I forwarded your email to the security experts at CargoNet and asked them to contact you to provide help.

Editor's Note: To report a cargo theft contact CargoNet at 888 595 2638, or visit their website at www.cargonet.com

FREIGHT CHARGES – BROKER COLLECTING AFTER PAYING CARRIER

Question: We are a brokerage. We pay our delivering carriers regardless of our being paid. Can we, in the event of non-payment, legally collect from the other parties on the bill of lading ("BOL") (i.e. consignee was client, not paid, go after shipper)?

Answer: Under certain circumstances a carrier may have recourse for its freight charges against either the shipper or the consignee named on the bill of lading, since the BOL is the "contract of carriage".

However, a broker only has a contract with the party that hired or contracted with the broker (usually through a rate confirmation or other contractual document). Thus, the broker only has recourse pursuant to its contract with the party that hired it and agreed to pay the freight charges.

RECENT COURT CASE

CONTRACT TERMS PREVAIL OVER BILL OF LADING

On a motion for partial summary judgment, the U.S. District Court in New Jersey ruled that the liability of UPS Ground Freight, Inc. ("UPS") was not limited by the value declared on the bills of lading, but was subject to the overriding terms of the contract between the parties. This was in contrast to a prior District Court of New Jersey decision that was not precedential (*Penske Logistics, Inc. v. KLLM, Inc.*, 285 F. Supp. 2d 468(D.N.J. 2003) wherein the court enforced the limitation of liability in the bill of lading over that in a contract by interpreting both contracts as a whole).

In this subrogation action, G.E. Healthcare ("G.E.") alleges it suffered damage to two interstate shipments of goods in the amount of $1,039,484.94 as a result of UPS's mishandling of the loads. UPS contends that its liability is limited to the value of the goods declared on the bills of lading, $2.30 per pound, for a total of $15,772.80.

The court's analysis looked at the language of the contract between the parties:

> GE as "Shipper" and UPS as "Carrier" had an overall contract governing their relationship. That GE Contract provides at section 7(A):
>
> A. Carrier is liable to Shipper for full invoice value (see paragraph E) of Shipper's goods for loss or damage to goods....
>
> GE Contract § 7(A) (the "Full Invoice Value" provision). The cross-referenced paragraph 7(E) provides:
>
> E. Except as otherwise provided, Carrier's maximum liability will not exceed $250,000 per occurrence.
>
> GE Contract § 7(E) (the "$250,000 Limit" provision).
>
> The GE Contract also has an override provision, paragraph 2(E):
>
> E. To the extent that any bills of lading, or other shipment documents used in connection with transportation services provided pursuant to the contract are inconsistent with the terms and conditions of this contract (including the terms and conditions of Appendices or Exhibits incorporated by reference), the terms and conditions of this Contract (and any incorporated Appendices and Exhibits) shall govern.

*2 GE Contract § 7(E) (the "Override Provision"). Finally, the GE Contract contains an "Entire Contract" clause, providing that its terms cannot be modified or waived except by a writing signed by both parties. GE Contract § 15 ¶7.

The issue came down to a dispute over which would control, the value declared on the bills of lading or the more general "Full Invoice and $250,000 Limit provisions of the GE contract."

The court relied on the override provision in 2(E) of the contract in determining that the contract, and not the bill of lading, controlled. The court was further bolstered in its decision by the language in the GE Contract at §15 ¶7, the "Entire Contract" or "Integration" clause, which provided that the terms of the GE Contract could not be altered except by a writing signed by both parties. The court noted that the bill of lading is not signed by both parties (i.e., by GE and UPS) and found it is reasonable to conclude that GE, in giving primacy to the Contract and requiring a mutual writing to alter it, sought to protect itself against the actions of third parties.

Indemnity Insurance Company of North America, a corporation, Plaintiff, v. UPS Ground Freight, Inc., d/b/a UPS Freight, a corporation, Defendant. Civ. Nos. 13-3726, 13-3727 (D.N.J. 6/2/2016).

NOTE: This decision goes to support our long standing position that a well-drafted contract is very important in protecting one's interests.

CCPAC NEWS

CCPAC

Established in 1981, the Certified Claims Professional Accreditation Council ("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: 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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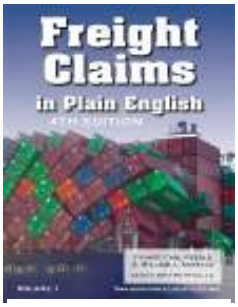

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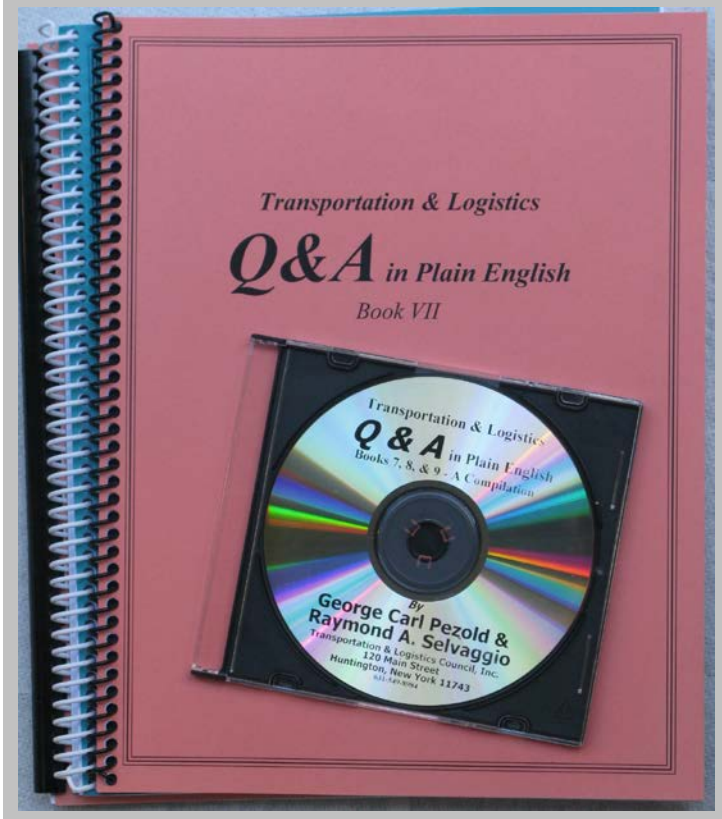

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