TRANSDIGEST

Transportation & Logistics Council, Inc.

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Still Time to Register - Fall Seminars

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Q & A IN PLAIN ENGLISH – BOOKS 7, 8 & 9 - A COMPILATION

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GUEST EDITORIAL

SOLAS – A SHIPPER'S VIEWPOINT

By: Brian Whitson
Strategic Operations Manager – Mars

In December of 2015 I was given the opportunity to represent a large multinational organization as their North American Global Ocean procurement lead. I jumped at the chance to move back into the exciting world of international transportation. Little did I realize that a well-intended amendment to the SOLAS (Safety of Life at Sea) Convention would encompass the majority of my first few months in this new position.

I did have some experience in wading through ambiguous regulatory waters, having worked in airfreight during the turbulent time period after 9/11, with the numerous (and likewise well intentioned) TSA requirements that followed. At first glance nothing stood out as being too difficult, or unreasonable about the SOLAS amendment which was:

> To require mandatory verification of the gross mass of containers, either by weighing the packed container; or weighing all packages and cargo items, using a certified method approved by the competent authority of the State in which packing of the container was completed.

Sounds remarkably cut and dry right? You either weigh everything before you load it on the container, or after. Most people would expect that this is already an action taken by all shippers of cargo around the world, as everyone is already listing the weight on their respective shipping documents. However, when taking a step back and looking at a complex supply chain with differing shipping locations and processes around the world, verifying the last component (a certified method) of the requirement looked to be a daunting task with only a few months' time to manage.

We went to work evaluating all of our shipping locations to determine if a scale meeting the letter of the regulations was available or not. Unfortunately due to the wording "certified method approved by the competent authority of the state", we found that in most cases we did not have the scales that completely fulfilled this requirement. I had heard stories of some shippers investing in scales at all shipping locations, however due to the lack of clarity on what type of scales actually met the requirements, who could say if a capital investment of that size would be a prudent decision? This left us the option of weighing the loaded container at truck weigh-stations as a component of our drayage. Once we dug into that process from each shipping location, we found that further ambiguity within the regulation left even this simple process confusing; what about variances in tare weights, truck fuel levels, dray cabs, etc? Carriers and the ports made it clear this was a shipper requirement, and with a large percent of our network being carrier contracted door moves, would we then have to update every carrier contract as well in order to allow a separate weighing by our designated drayage provider?

With those questions swirling, we learned that the US Coast Guard had made a statement concerning this topic at the 2016 TPM Conference. In their view the US was already compliant. Many countries throughout the world did not have the same "we're good" viewpoint as the US, with fines or even criminal penalties being the potential outcome for non-compliance, reinforcing the level of confusion that existed within the category. As the July 1st implementation date approached, the game of chicken continued; wait and see with the hope that SOLAS was delayed/scrapped, or take proactive measures (i.e. incur costs) to ensure your business was not the one taken as an example by any of the countries that approved the amendment.

In the end our team managed to update a network that had the ability to scale all containers in advance of the deadline, only to laugh, as we finally confirmed at around 4pm the day before July 1st that essentially all US terminals would allow their terminal weight to be used to meet the SOLAS requirements (i.e. no change from how we were operating). Unfortunately this news was not able to resolve the entire network, as there was (and is) still one hold-out; anything coming into the ports via rail did not have this option. From a shipper's perspective additional stresses were placed on our networks, costs were incurred, and numerous work hours were occupied.

The question I still ask myself is; is it really keeping anyone safer at sea as it was intended?

ASSOCIATION NEWS

IN MEMORIAM

I regret to report that Marla Wolters has passed away. Marla had recently retired from 3M with over 30+ years of service. Marla was not married nor did she have any children, but she was full of life and would love to always have a great time. She was a long time TLC member and served on TLC board as secretary treasurer until her retirement. I personally am proud to have called her a good friend and am happy that she was able to join us at our Annual Conference in Albuquerque this past May.

Life is short so enjoy every precious magical moment. Don't let important words go unsaid, and let your loved ones know that you love them.

Diane Smid
Executive Secretary
Transportation & Logistics Council

FALL SEMINAR SCHEDULE – STILL TIME TO REGISTER

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**, **Contracting, and Transportation 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 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 transportation professionals and attorneys confront in their day-to-day activities:

- 2016 regulatory update: FSMA, SOLAS, driver coercion prohibition
- Latest cases pertaining to vicarious liability for highway accidents and deaths; selecting carriers to minimize risk
- Update on congressional mandate for FMCSA to remove BASIC scores
- Significant changes to NMFC and the Uniform Bill of Lading that you need to know
- Cargo liability insurance vs. cargo insurance
- Liability for freight charges and exposure to having to pay freight charges twice
- Map-21 and how it affects you

Fee for this seminar includes course manual

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.

NEW MEMBERS

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

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CLASSIFICATION

TLC CHALLENGES SURPRISE BOL CHANGES – ROUND TWO

by George Carl Pezold
Executive Director

The Council previously reported on the surprise changes proposed by the National Motor Freight Traffic Association ("NMFTA") to the Uniform Straight Bill of Lading ("UBOL") published in the National Motor Freight Classification ("NMFC"). The changes were published in Supplement 2 to NMF 100-AP, which became effective August 13, 2016, and make significant changes to the UBOL, including the Terms and Conditions on the reverse side, which will drastically impact the liability of motor carriers and the recovery of loss and damage claims.

On July 29th the Council filed a Petition for Suspension and Investigation with the Surface Transportation Board ("STB") in opposition to the proposed changes to the Uniform Straight Bill of Lading. The National Shippers Strategic Transportation Council ("NASSTRAC") filed its comments in support of the Council on August 1st.

On August 12th, the STB issued a decision in which the Board refused to suspend the changes to the bill of lading, but identified certain questions and invited further comment as to its jurisdiction to investigate or suspend the changes, as well as related matters.

In response to the Board's decision, on September 12th, the parties each filed supplemental pleadings. NMFTA continues to argue that the STB lacks jurisdiction over collectively-made changes to the bill of lading. The Council addressed the Board's jurisdiction and the potential impact of the changes on carrier liability for cargo loss and damage, and NASSTRAC, joined by the National Industrial Traffic League ("NITL"), filed supplemental pleadings in support of the Council's position. In addition, the Transportation Intermediaries Association ("TIA") has now filed its comments in support of the Council. Copies of the following supplemental pleadings are available on the Council's website; www.TLCouncil.org:

TLC Supplemental Pleading (Filed 9-12-16)
NASSTRAC Supplemental Pleading (Filed 9-12-16)
NMFTA Supplemental Comments (Filed 9-12-16
NIT League Petition to Intervene (Filed 9-12-16)
TIA comments to STB (Filed 9-15-16)

It remains to be seen what action will be taken by the STB. Since the STB was created following the ICC Termination Act of 1995, it has been primarily involved in railroad rate cases and other rail matters. In fact, the last time it exercised jurisdiction over issues involving the Uniform Straight Bill of Lading was in 1997, some 19 years ago.

If allowed to remain in place, the new rules in the Uniform Straight Bill of Lading have the potential to seriously impact shippers' ability to recover freight loss and damage claims against carriers. Accordingly, the Council urges shippers or anyone responsible for filing and recovering freight loss and damage claims to submit comments in support of the Council's position in this important matter.

The proceedings before the STB will continue to remain open for further replies and comments until October 3rd. Parties wishing to submit replies or comments should file them electronically or by mail to:

Chief, Section of Administration

Office of Proceedings
Surface Transportation Board
395 E. Street, SW
Washington, DC 20423

And refer to: Docket Number ISM 35008, Transportation and Logistics Council – Petition for Suspension and Investigation.

FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD ("CCSB") DOCKETS

	Docket 2017-1	Docket 2017-2
Docket Closing Date	December 1, 2016	March 23, 2017
Docket Issue Date	December 29, 2016	April 20, 2017
Deadline for Written Submissions and to Become a Party of Record	January 20, 2017	May 12, 2017
CCSB Meeting Date	January 31, 2017	May 23, 2017

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

HAZMAT

PHMSA AND OSHA CLARIFY HAZMAT LABELING FOR BULK SHIPMENTS

On September 19, 2016 the U.S. Department of Transportation's ("DOT") Pipeline and Hazardous Materials Safety Administration ("PHMSA") and the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") issued a joint guidance memorandum clarifying the applicability of their respective requirements for labeling hazardous chemicals. The joint memo provides an overview of each agency's scope of authority, and guidance on the applicability of PHMSA and OSHA labeling requirements with an emphasis on bulk packaging used in transportation and in the workplace.

With reference to this guidance, labeling includes all DOT placarding, signs, and other markings. PHMSA labeling requirements may be found in the U.S. Hazardous Materials Regulations (HMR; 49 CFR Parts 100-180), and OSHA labeling requirements may be found in the Hazard Communication Standard (HCS 2012; 29 CFR § 1910.1200).

For more information on DOT's efforts to improve hazardous materials safety and awareness, or to access U.S. Hazardous Materials Regulations, visit the PHMSA website at www.phmsa.dot.gov.

SAMSUNG GALAXY NOTE 7 LITHIUM ION BATTERIES

The transportation of lithium ion batteries has been subject to numerous regulations due to their hazardous potential to start very hot, difficult to control, fires. This past year "hoverboards" were the subject of regulation due to spontaneous combustion and now the Samsung Galaxy Note 7 is creating problems.

On September 15, 2016 the U.S. Department of Transportation's ("DOT") Pipeline and Hazardous Materials Safety Administration ("PHMSA") issued a notice outlining safety requirements for airline passengers or crew traveling with a Samsung Galaxy Note 7 smartphone device subject to the U.S. Consumer Product Safety Commission's ("CPSC") Recall No.16-266.

According to the notice:

> Individuals may only travel by aircraft with a Samsung Galaxy Note 7 smartphone device subject to the CPSC recall if they comply with the following instructions:
>
> • Turn off the device;
>
> • Disconnect the device from any charging equipment;
>
> • Disable all applications that could inadvertently activate the phone (e.g. alarm clock);
>
> • Protect the power switch to prevent the phone from being unintentionally activated or turned-on; and
>
> • Keep the device in carry-on baggage or on their person, and do not place in checked baggage.
>
> * * * *
>
> For additional information on the recall, visit the CPSC website at www.cpsc.gov.
>
> For additional information on returning your recalled Galaxy Note 7 device to the manufacturer, call 1-800-SAMSUNG or 1-800-726-7864.
>
> For additional information regarding safe travel with lithium batteries and other potentially hazardous materials, visit the DOT Safe Travel Website at http://phmsa.dot.gov/safetravel/batteries. Additional passenger information from the FAA is available at: http://www.faa.gov/Go/PackSafe. For all other questions regarding the transportation of hazardous materials, contact PHMSA's Hazardous Materials Information Center at 1-800-467-4922 or infocntr@dot.gov.

To view the notice, visit:
http://www.phmsa.dot.gov/staticfiles//PHMSA/DownloadableFiles/Files/Samsung_Press_Release.pdf

MOTOR

AUTONOMOUS VEHICLES

They have been in the news and on the highway and they are coming. Autonomous vehicles ("AVs"), self-driving cars and trucks (and ships and aircraft), are being designed and tested as the technology to support them has developed. There have been accidents and crashes along with evidence that security is, and will remain, a significant issue as systems can be hacked. But the technology is being developed, tested and constantly improving.

On September 20, 2016 the U.S. Department of Transportation's ("DOT") National Highway Traffic Safety Administration ("NHTSA") released its federal guidelines for the regulation of autonomous vehicles, the *Federal Automated Vehicles Policy*. It includes guidelines for vehicle manufacturers; a model policy for states; and a discussion of current regulatory tools and new tools that could accelerate the development and use of AVs.

According to the DOT, the *Policy*:

> sets out a proactive safety approach that will bring lifesaving technologies to the roads safely while providing innovators the space they need to develop new solutions. The Policy is rooted in DOT's view that automated vehicles hold enormous potential benefits for safety, mobility and sustainability."
>
> The primary focus of the policy is on highly automated vehicles ("HAVs"), or those in which the vehicle can take full control of the driving task in at least some circumstances. Portions of the policy also apply to lower levels of automation, including some of the driver-assistance systems already being deployed by automakers today.

It is anticipated that automation will come in stages, and the *Policy* adopts the SAE International definitions for levels of automation (some of which is already widely available). The SAE definitions divide vehicles into levels based on "who does what, when" and are generally as follows:

- At SAE Level 0, the human driver does everything;
- At SAE Level 1, an automated system on the vehicle can sometimes assist the human driver conduct some parts of the driving task;
- At SAE Level 2, an automated system on the vehicle can actually conduct some parts of the driving task, while the human continues to monitor the driving environment and performs the rest of the driving task;
- At SAE Level 3, an automated system can both actually conduct some parts of the driving task and monitor the driving environment in some instances, but the human driver must be ready to take back control when the automated system requests;
- At SAE Level 4, an automated system can conduct the driving task and monitor the driving environment, and the human need not take back control, but the automated system can operate only in certain environments and under certain conditions; and
- At SAE Level 5, the automated system can perform all driving tasks, under all conditions that a human driver could perform them.

One of the goals of the DOT is to assure developers and stakeholders that there is uniformity of regulation throughout the nation. The policy is the product of significant public input and stakeholder discussions so far, and there is an ongoing request for further comments. Utilizing this input, the DOT intends to update the policy annually.

The DOT has issued a Request for Comment ("RFC") on the Policy, which is available at www.nhtsa.gov/AV, or in the docket for this Policy, NHTSA-2016-0090.

Visit http://www.nhtsa.gov/About+NHTSA/Press+Releases/dot-federal-policy-for-automated-vehicles-09202016 to view the press release, and https://www.transportation.gov/AV to view the DOT's AV website and visit https://www.transportation.gov/sites/dot.gov/files/docs/AV%20policy%20guidance%20PDF.pdf to view the *Federal Automated Vehicles Policy* in its entirety.

OCEAN

HANJIN SHIPPING FILES BANKRUPTCY

A lot can happen in a month and September was a doozy in the world of ocean transportation. On August 31, 2016 Hanjin Shipping filed for bankruptcy protection in Seoul, Korea, causing a frantic effort by shippers to locate and gain control of their containers, and make alternate arrangements. This has caused and will continue to cause reverberations throughout international supply chains and the transportation sector.

In no particular order, some of the impacts/results/reverberations of this bankruptcy include:

- Ships, with their crews on board, are unable to enter port and unload cargo due to reluctance to provide services for which there is great doubt that the service providers will be compensated for.
- Shippers in limbo as to where their product is and when they will be able to retrieve it.
- Shippers being gouged in order to retrieve their cargo.
- Non Vessel Operating Common Carriers ("NVOCCs") and other third party providers being stuck in the middle between their customers and Hanjin.
- Shippers being hit with detention and demurrage charges for containers stranded by the bankruptcy.
- Terminals uncertain of reimbursement for services provided, refuse to let Hanjin containers enter or leave, or require them to be removed.
- Loss of work affecting the entire supply chain, including port truck drivers, tugboat operators, pilots, longshoremen and warehousemen.

All this is exacerbated by the fact that the bankruptcy was filed in South Korea (where Hanjin is based). It has filed for Chapter 15 status under U.S. Bankruptcy law, which would allow the U.S. court to recognize the South Korean bankruptcy. This will take some time to sort out.

Hanjin published on its website an Excel chart showing the operating vessel status as of 9/12/16 of some 97 vessels: 58 ships were waiting in open sea, 19 ships were underway, 11 ships were under embargo, five ships were arrested, two ships were listed as owner withdrawal, and one ship as redelivered.

To view the vessel status chart, visit:
http://www.hanjin.com/hanjin/CUP_HOM_1764.do?langSeq=&srchWord=&brdId=&hpgLang=&brdSeq=1192&rowTot=&current=&currentPageGroup=1&pageCnt=1&srchKey1=&rowNo=&perRow=&sessLocale=en&ctgId=CEN_100003&prntMnuId=CEN_100003&mnuId=CEN_200015&currentPage=1&p_srchKey=00&p_srchText=.

PARCEL EXPRESS

IMPACT OF FEDEX AND UPS GRIS

by Tony Nuzio, CEO
ICC Logistics Services, Inc.

Following an announcement made on September 1, 2016 by UPS, FedEx on September 19, 2016 has announced its 2017 General Rate Increases. UPS' rates will be increased effective December 26, 2016, while FedEx' increased rates will become effective on January 2, 2017. These increase announcements are an annual ritual for the Parcel Carrier Giants, and there are significant changes that you, the shipper need to be aware of to make the best decisions on your shipping moving forward.

This year's announcement by FedEx brings a few surprises for its customers. First and foremost, FedEx' Express Package and Freight standard list rates will increase an average of 3.9% while UPS' increase announcement indicated their list rates for these same services would increase by 4.9%. For FedEx Ground and FedEx Home Delivery, the standard list rates will increase 4.9%, the same percentage increase UPS will take on their Ground Delivery charges.

There are other variables in these carriers' rates when these increases are published and some of these changes will end up taking a big chunk of money out of many FedEx customers' wallets, for example:

- FedEx will change the Dimensional Weight Divisor for Ground Shipments from the current factor of 166 to 139; back in 2010, the Dimensional Weight Divisor was 194. Here is an example of the impact this change alone can have on a shipper's annual freight expense. This is based on an actual shipper's current and proposed costs.
- A 38 lb. Ground package shipped to Zone 6, with package dimensions of 34" x 16" x 13"
- With a dim factor of 166 the dimensional shipment weight would be 42.6 lbs., rated out at 43 lbs. for a total cost of $35.35.
- With the new dim factor of 139 this same shipment's dimensional weight is now 50.8 lbs., rated out at 51 lbs. for a total cost of $38.56
- The total cost differential is $3.21 more than the previous cost, or 9% higher overall
- FedEx Freight has also increased its fee for Extreme Length Surcharge from $85.00 to $150.00. Not only that, this increase will be applied when the dimensions of the package are 12 feet and over compared to 15 feet and over which is the current calculation. This change alone represents an increase of 57%.
- And another striking change will take effect on February 6, 2017, when FedEx will start adjusting its Fuel Surcharge percentage on a Weekly basis compared to their current adjustments which are on a monthly basis. We can't help but wonder that FedEx may be thinking the days of low fuel prices may be coming to an end and they want to be in a position to jump on these increases weekly instead of having to wait as long as a month or more to make the adjustment.

If this sounds confusing, that's because it is. It's more important than ever for the shipper to have the knowledge it needs to make the best decisions on shipping. This confusing new reality comes with many variables to consider.

ICC Logistics has created List Rate Comparison Charts for both FedEx and UPS, comparing the 2016 Base Rates with the 2017 Base Rates to help the shipper better understand how these rates will affect you and

arm you with the best information to make decisions. ICC Logistics also has created The Accessorial Rate Increase Comparison for 2016 vs. 2017. These charts are available by request on the ICC website at www.icclogistics.com.

QUESTIONS & ANSWERS

By George Carl Pezold, Esq.

FREIGHT CLAIMS – LIABILITY LIMITATIONS FOR "USED" ANTIQUE AUTO PARTS

Question: We had sent a door from a 1957 Porsche to a restoration shop in California for a new door skin. The shop put the new skin on and sent it back to us in Illinois, but it was found that the door didn't fit properly since the new skin pulled the old frame out of alignment. We then sent it (and a hood for the Porsche) back again via UPS Freight to the restoration shop in California to have the problem corrected.

When shipped, the Bill of Lading (B/L) was marked as Auto Parts, Class 150, 345 Lbs. No Excess Declared Value or request for insurance was noted, and we did not indicate if the parts contained were new or used. The carrier's driver signed and dated B/L and had no notations or exceptions.

When the shipment arrived in California it was signed for as damaged by the receiver, and noted. The crate had damage to the 2" x 8" bottom boards and when opened up for inspection found that the door had been bent by the 2" x 8" bottom boards being pushed up against the door and hood. We got a phone call from the auto restoration dealer, that the crate was indeed damaged, with a puncture to the bottom side. We theorized that the crate got flipped up by the carrier, when loading their trailer, to maximize the load space in their trailer. With the crate standing on its 24" side, exposed 2"x 8" bottom side, which got punctured by a fork, from a lift truck, or from some other freight that was pushed against our crate. The door frame was bent and may be unusable since it can not be realigned well enough to be put back on the car.

We went through the standard claim procedure with the carrier, and the carrier responded with a finding of the parts were "used". Even though the carrier's tariff says that "Class 150" would normally have a liability limit of $18 per lb., the carrier says that their limit for "used" items is only $1 per pound, or $345. A used 1957 Porsche door is worth $3800 and a new one, if it could be found, $5200, but we only received $345 for a "used" part, regardless of its origin.

My questions are:

1. Did not marking Excess Declared Value section of the Bill of Lading give the carrier ability to limit liability to $1 per lb.?
2. The carrier limited its liability once they established that the parts were used instead of new. How do you establish an intrinsic value when we're talking about a 1957 Porsche, not a cheap car for parts, even used?
3. Why did the Class 150 not help out establishing the higher value at $18 per lb.?
4. Should we have known better on the issues of antique type auto parts (used), with high replacement value, and gotten freight insurance to cover issue of shipping damage?
5. Is it worth our time and money getting our lawyers involved, trying to argue the issues with the carriers, knowing and reading their tariffs, which can be difficult to understand and apply.

Answer: Most less-than-truckload ("LTL") carriers do publish very low liability limitations for "used" items in their rules tariffs, anywhere from $0.10 cents a pound to $2.00 a pound. Since such shipments are usually from individuals or small shippers who only occasionally ship such items, they are unlikely to be aware of the liability limitations, which are usually buried somewhere in a tariff - a real "trap for the unwary".

In your case you used the carrier's form of the Uniform Straight Bill of Lading. These bills of lading all contain language (either at the top or bottom of the form) that says:

> RECEIVED, subject to individually determined rates or contracts that have been agreed upon in writing between the carrier and shipper, if applicable, otherwise to the rates, *classifications and rules that have been established by the carrier* and are available to the shipper, on request. . . . Every service to be performed hereunder shall be subject to all conditions not prohibited by law, whether printed or written, herein contained, including conditions on the back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

This language essentially incorporates the National Motor Freight Classification ("NMFC") as well as the carrier's rules tariffs which contain the liability limitations. It should be noted that Item 429 of the NMFC, Classification of Reconditioned Articles, does say:

> Unless otherwise provided in this Classification or in other tariffs governed by this Classification, articles which have been rebuilt, refurbished, remanufactured or reconditioned in any will be subject to the same provisions applicable to such articles when new.

However, carriers often ignore this language and provide that the limitation applies to anything "used" whether or not it has been rebuilt, refurbished, etc. For example, your bill of lading has this language in a box on the face of the bill of lading:

> UPS Freight LIABILITY: Carrier liability for loss or damage will be the lesser of (1) the actual invoice value of the commodities or article(s) lost, damaged or destroyed; or (2) the amount determined from applicable limited liability provisions of the NMFC; or (3) the limited liability as stated in the applicable governing tariffs, unless Excess Declared Value Coverage is specifically requested along with the amount of coverage needed in writing on the bill of lading at the time of shipment and applicable charges are paid. Maximum carrier liability is limited to $25.00 per pound per package and $100,000 per shipment. Liability for commodities or articles *other than new* is limited to $1.00 per pound per package (and up to a maximum $2.50 per pound per package when Excess Declared Value Coverage is requested).

And, if this were not enough, Item 166 B of Tariff UPGF 102-G has this language, which supersedes both the NMFC and the general liability limitations tied to the Class of an article:

> . . . Commodities or articles which are in any way other than new (including, but not limited to, commodities or articles which are "used", "reconditioned", "refurbished", or "rebuilt"); commodities or articles shipped as part of an Interplant Move; and commodities or articles purchased through internet auctions, whether listed on the bill of lading as such or not, will be accepted for transportation subject to the following Carrier liability limitations and conditions:
>
> 1. Carrier's liability for loss, damage, or destruction to any shipment or part thereof is limited to the actual invoice value of the commodities or articles lost, damaged or destroyed, or $1.00 per pound per package, whichever is less, unless Excess Declared Value Coverage is requested and the additional charges are paid.

Unfortunately, the courts generally enforce liability limitations such as these that are either on the face of the bill of lading or are in tariffs that are incorporated by reference through the bill of lading language. The

"bottom line" is that you are just another victim of this "trap for the unwary" and it is highly unlikely that you could recover more than the $345 that the carrier offered.

What can shippers do to avoid this type of problem? First, as the language of the bill of lading indicates, the carrier's tariffs are "available on request", so that the shipper should ask in advance if there is a liability limitation and for a copy of the applicable tariff item. Second, it may be possible to declare a value and get additional protection by paying an excess valuation charge, but note that the maximum available from this carrier is $2.50 a pound, and many carriers do not even offer a choice of rates or a higher valuation. Third, if the "used" item is very valuable, and/or susceptible to theft or damage, the shipper can get transit or "inland marine" insurance coverage.

BILLS OF LADING – USE OF ELECTRONICALLY SUBMITTED "PDF" COPIES

Question: A question has recently come up regarding sending ".pdf" files of scanned original bills of lading. While I understand it is not good practice to do so, is it actually illegal? We have been requested to do this from various parties, including the carrier in some instances, so I'm looking for guidance. Should we should be doing this?

Answer: Scanned documents and "pdf" versions of the documents are commonly accepted in today's electronic environment. The only caveat is that in the event of a dispute over the authenticity of a scanned document, it is important for the shipper to retain the original (paper) bill of lading or receipt for the goods, since that is the legal contract of carriage. Electronic copies could have alterations that are not on the original document and sometimes it is critical to be able verify signatures or other notations on the bill of lading or receipt that was actually received by the shipper at the time the shipment was tendered to the carrier.

FREIGHT CHARGES – LIABILITY WHEN BROKER FAILS TO PAY CARRIER

Question: Broker was paid from shipper and skipped out on paying us. Is the shipper responsible for the freight charges owed to our company even though they paid the Broker?

Answer: While the shipper may be liable for the freight charges (even though it has paid the broker) the liability depends on the contract of carriage, usually the bill of lading, and this is a factual question. For example, if the carrier's name is not shown on the bill of lading, or the shipper has executed the "non-recourse" section on the bill of lading, it may have a defense.

BROKERS – NEED FOR BROKER LICENSE WHEN MOVING GOODS ON BACKHAUL

Question: I have just found your website and will become a member. I hope you can give me and the company I work for some direction.

I work for a family owned business that is an organic grocery producer and distributor. We use several contract carriers to deliver these products. The carriers are contracted to deliver the company's products on dedicated routes and are paid additional pickup pay for every pickup that we need done on the return backhaul trip.

This product that they pick up on the backhaul is product that is later delivered on their routes.

Recently we decided to start hauling other peoples' products or freight inbound to the warehouse and then delivering on these routes helping to offset the cost of backhauling half-empty trailers.

The carriers are still paid the additional pickup pay, but one of the carriers has said we are not able to legally do what we are doing.

He said picking up other freight for other companies so that we can make a profit cannot be done in the fashion we are doing it.

Our company has no broker's license, insurance covering the backhaul load and no DOT authority. We use each of our carriers' DOT authority to do the delivery routes, and pickup and deliver this other freight. Is what we are doing legal, and if not, what do we need to do to make it legal?

Also, this carrier says his name is on the bill of lading and that now makes him liable. Is that so?

In addition, we have not gotten this freight through a broker but rather through the manufacturers themselves. If we went through a broker to haul this freight and then had our carriers haul it, is that legal? Or should we possibly get a brokers' license if we intend to advertise to haul other peoples' freight?

Hope you can help. Thanks!

Answer: The definition of a broker is found in 49 USC Section 13102:

> (2) Broker. - The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.

The key is "for compensation". If you are actually arranging with the carrier to transport goods for other shippers or owners of the freight and are being compensated, it would be considered brokerage and you would need to be registered with the Federal Motor Carrier Safety Administration ("FMCSA") as a broker. Failure to do so could result in significant penalties under the law.

As for loss or damage to the goods, the carrier would be primarily liable for any loss or damage while in its possession, but it is very likely that the shipper or owner would look to your company for payment of any claims.

That is why most brokers carry what is known as "contingent cargo liability insurance".

I would suggest that you apply for a broker's license if you intend to continue this practice.

FREIGHT CLAIMS – SALVAGE AFTER "ON-HAND" NOTICE

Question: Our consignee rejected 76 damaged cases of paper bags. Several months after the rejection our customer filed a claim for those cases. The common carrier originally approved payment but quickly refused because they said an "on-hand" notice was sent to all parties asking for disposition on the cargo, or it would go for salvaging. The shipper, consignee, and broker confirmed no "on-hand" notice was received.

The motor carrier said the money received from the salvaging will be used to pay for their storage and other miscellaneous fees and the claim will remain denied.

Can the motor carrier deny the claim on this basis? Can the claimant still collect?

Answer: Obviously there is a dispute over the facts -- whether the carrier actually did send the on-hand notices. If it could be proven that this was not done, then the carrier acted improperly in selling the goods without the consent of the owner and could be liable for conversion and the full value of the goods.

However, from your description of the facts, unless it is a significant claim, it probably would not be cost effective to bring a legal action against the carrier.

FREIGHT CLAIMS – SETOFF CLAIM PAYMENT AGAINST OTHER FREIGHT CHARGES

Question: I was writing seeking information on setoff. We currently have a customer who has filed a claim with us. All freight charges for the Airway Bill that pertains to the claim have been paid. It has been determined that we were liable for the lost freight and a decision has been made to pay the customer for the lost item. However; our Accounting Department has asked if we could legally use the payment as a setoff to pay other freight charges for other outstanding airway bills that the customer has not paid. Is this a possibility? If the customer agrees, can we apply it directly to the account or do we have to send the check to him and he sends it back as payment?

I have been looking for a simpler answer to give to the Accounting Department other the long explanation in *Freight Claims in Plain English* 12.3.6 "Counterclaims and Setoffs".

Answer: Technically your liability to your customer for the loss or damage, and your customer's liability for payment of freight charges for unrelated air waybills are completely independent matters.

However, it is not "illegal" to setoff mutual obligations or debts: shippers often withhold payment of freight charges when there is a cargo claim and carriers sometimes refuse to pay claims when freight charges have not been paid.

My suggestion is to notify the customer of your intention to setoff the freight charges against the cargo claim and get their authorization to do so.

FREIGHT CLAIMS – LIABILITY FOR BLOCKING AND BRACING LOAD

Question: Who is responsible to secure the load within the trailer if it is a collect shipment, FOB ex Works.

Answer: I assume you are asking about a domestic motor carrier movement.

As a general rule, unless it was a "shipper load and count" full truckload shipment, loaded and counted by the shipper without the carrier's driver having an opportunity to witness the loading, the law is clear that the motor carrier is responsible for proper blocking and bracing of the cargo.

This would be true regardless of the terms of sale between the seller and the buyer.

FREIGHT CLAIMS – MITIGATING THE LOSS

Question: We are a freight forwarder, and so in the eyes of the distribution center ("DC") we are the carrier and for the following claim, the DC is the claimant.

· On 06/07/2016 we had a shipment rejected at one of our DCs because branded product had tipped and spilled all over the trailer.

· On 06/08 we were instructed by the brand that the shipper would assist with reclamation and to return the shipment to the shipper.

· On 06/10 our trailer was stopped by DOT because the leakage had seeped through the trailer floor and was leaking on the roadways. Carrier could not have product reworked until 06/16.

· On 06/17 the product was redelivered to the shipper whom in turn provided the driver with a proof of delivery ("POD") showing the shipment was returned with the full case count.

· On 06/22 the shipper informed us they were waiting for a quality assurance ("QA") inspection before they could advise what product was salvageable.

· On 08/28 we instructed the DC that since no proof of damages has been supplied by the shipper and our driver was provided with a POD showing the full case count was returned, that we are going to deny the claim. We have followed up with the shipper on more than 3 separate occasions since 06/22, however on 08/29 the shipper responds saying that they are still inspecting the product but if we are to deny the claim, they are going to dispose of the product and adjust the claim for the full shipment value.

Who would be liable for this claim? Please keep in mind the shipper has not provided any proof of damages, supplied a POD that shows the product returned for the full case count, and has been holding food grade product for over 10 weeks.

Answer: It appears that you have a problem with your shipper. Since there apparently was some damage when the carrier first attempted to deliver the shipment and it was rejected, you can file a loss and damage claim with the carrier for the full value (invoice price) of the goods.

The problem is with the amount of the damages. Since it isn't clear as to the extent of the damage or whether it is possible to reclaim, repackage or salvage the goods, the carrier will probably argue that there is a "duty to mitigate the loss" and that the claimant has failed to do this.

FREIGHT CLAIMS – FOOD PRODUCT DELIVERY WITH KITTENS IN THE TRAILER

Question: We are a Broker. We had a shipment of food grade film on a less-than-truckload carrier. At the stop before our shipment was to deliver, four baby kittens entered the trailer (we are assuming someone put them in the trailer). After the trailer was unloaded, the driver locked his trailer and went to the next stop where the food grade film was rejected when they opened the door and saw the kittens.

Our question is, did consignee have any responsibility to accept freight and put it through inspection for contamination before rejecting the load? The freight is now being returned to the shipper. Who is responsible and what do you think liability will be?

Answer: We often have questions about food and food-related products, as there are special rules when the health and well-being of people might be impacted.

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

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

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

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

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

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

I would suggest that if it is possible that the goods can be inspected or tested to determine if they are useable or saleable, this should be done.

If the shipper can establish for good reasons why the goods cannot be used or sold, and must be destroyed, then a claim should be filed with the carrier. In any event, I must tell you that most carriers will take the position that the shipper must prove that there was in fact some damage or contamination, and probably deny liability.

FREIGHT CLAIMS – MEASURE OF DAMAGES

Question: We are a CO-OP and we buy produce for our members. We have a carrier that is requesting that we send our pricing for our product to him for support of a claim. We have supplied him with the invoice to the member rather than from the vendor as the pricing that we have is considered a trade secret. Do we legally have to provide an invoice for our pricing (cost)?

Answer: This question comes up frequently, as carriers seek to minimize the payments they have to make on claims.

In the ordinary sales transaction, where goods have been lost or destroyed in transit, the invoice amount is acknowledged as the measure of loss. Thus, where a consignee-purchaser has assumed the risk of loss in transit, he will still have to pay for the goods even though he has not received them, and his damage is the amount of the invoice price. Conversely, if the seller had the risk of loss, he would be unable to collect his invoice price, and his loss would be the same amount.

Cases involving goods that had been sold to a customer, and which awarded the invoice price, include: *Philips Consumer Electronics Co. v. Arrow Carrier Corp.*, 785 F.Supp. 436 (S.D. N.Y. 1992); *Corning Incorporated v. Missouri Nebraska Express*, 1996 WL 224673 (E.D. Pa. Apr. 29, 1996); *Robert Burton Associates, Ltd. v. Preston Trucking Co.*, unreported, Civ. No. 96-745(NHP), (D. NJ Mar. 24, 1997), aff'd on reh., (D. NJ May 22, 1997), reversed in part and remanded, 1998 WL 381711 (3rd Cir. Jul. 10, 1998); *Custom Cartage, Inc. v. Motorola, Inc.*, No. 98C5182, 1999 WL 965686 (N.D. Ill. Oct. 15, 1999); *Paper Magic Group, Inc. v. J.B. Hunt Transport, Inc.*, 318 F. 3rd 458 (3rd Cir. 2003).

The *Philips* case involved a shipment of camcorders to a customer in Newburgh, New York. A portion of this shipment was never delivered and was later converted by the trucker, Arrow, which sold the camcorders as salvage. One issue was the measure of damages. Arrow argued that, because Philips had sent a replacement order to its customer, it was not entitled to a "double profit". The court rejected Arrow's argument, and held that the invoice price was the proper measure of damages.

Corning involved a shipment of glass panels from Corning to a customer which was damaged enroute. The carrier argued that since Corning had later made a replacement shipment to its customer, it was only entitled to its manufacturing cost. The court rejected defendant's theory and awarded Corning's invoice price, less the net salvage proceeds.

In *Paper Magic Group v. J.B. Hunt Transport*, 2001 U.S. Dist. LEXIS 13494 (E.D. Pa. 2001), aff'd, 318 F.3d 458 (3rd Cir. 2003), the District Court awarded the shipper's contract (invoice) price, stating:

> The measure of actual damages is the contract price. See *Illinois Cent. R. Co. v. Crail*, 281 U.S. 57, 64-65 (1930) (the market value test may be discarded when another more accurate measure of actual damages exists); *Robert Burton Assoc., Inc. v. Preston Trucking Co., Inc.*, 149 F.3d 218, 221 (3rd Cir. 1998) ("ordinarily when the carrier is responsible for the loss of the goods in transit, the shipper is entitled to recover the contract price from the carrier."); *John Morrell*, 560 F.2d at 280("[t]he only way to reimburse [a] shipper [whose goods were delivered late] for its 'full actual loss' is to use the contract price method."). It is undisputed that the contract price for

> the goods was $130,080.48. Paper Magic has evidence to prove the third element of its prima facie case.

The Court of Appeals noted that under principles of contract law, the measure of damages is "designed to put the injured party back in as good a position as it was before the contract was breached", and that:

> ...Given this purpose, the general rule is that when goods are lost or destroyed the shipper is entitled to damages in the form of the payment of the entire invoice price.

FREIGHT CLAIMS – FILING CLAIMS WITH 3PL

Question: Our company utilizes a 3rd party logistics ("3PL") company for booking and dispatching our freight. At one point we also utilized this company to monitor the claims that were incurred. The claims that we have filed are against this company and I am of the opinion that we have filed these claims with this brokering company that they should be paying these claims if not disputed; is that correct?

Their position on the claims that have gone unpaid; some as much as 360 days from filing, is that they are waiting on the carrier to pay the claim. Also, if the carrier has declined a claim to them when should they be notifying us of this declination? If a claim was filed within legal time frame and with sufficient backup, what is the recourse for collecting if the claim has gone unanswered and unpaid for more than 120 day from the date of filing?

Thank you for your time and assistance

Answer: First, unless you have a contract with the 3PL that requires it to assume liability for loss or damage claims, the general rule (and the court decisions) say that a 3PL (broker) is not liable for loss or damage in transit.

Many brokers offer to handle or process claims on behalf of their customers - filing claims with the responsible carriers and attempting to collect the claims, etc. - but this does not make them liable for the loss or damage.

If your broker has agreed to file claims on your behalf, it would seem reasonable that they should report back to you as to the status of the claim, whether it has been paid or declined, or whether the carrier has made a settlement offer. Again, failure to do so does not make the broker liable for the loss or damage.

If there is any question whether your broker has filed a claim on your behalf or the status of the claim, you should promptly file a claim directly with the responsible carrier. Under the "Carmack Amendment" you can file the claim against the receiving carrier, the delivering carrier, or the carrier in possession of the goods at the time of the loss or damage.

Claims must be in writing with sufficient information to identify the shipment and must make demand for a specified amount of money. For shipments moving under a Uniform Straight Bill of Lading, claims may be filed at any time up to nine (9) months from the date of delivery.

The Transportation & Logistics Council's website has a useful information booklet "How to File a Freight Claim for Loss or Damage" and you may wish to print it out separately and retain it as a handy reference (http://www.tlcouncil.org/sites/default/files/how_to_file_a_claim.pdf).

FREIGHT CLAIMS – NOTATIONS ON POD

Question: A short questions - where is it published concerning notations on a POD [proof of delivery]?

I have a business unit that ships rolls of plastic film that is very thin and the slightest bump can cause the entire roll to be worthless, as it is so thin and wrapped so tight on the roll. Sometimes the rolls are

delivered and you cannot tell if the film is damaged without being tested. If the film is damaged and is put into the delicate machines to run, it could cause some very expensive damages to the machine.

The question that has come up is, what notation could be used on the POD to alert the carrier of potential damages and serve as protection for a possible claim?

It is my recollection that notations like possible damages, subject to inspection are dubious and not to be used. Plus, the carrier does not recognize these remarks complete enough to protect a potential claim.

Answer: Your observations are correct. Unless some actual notation as to damage is made at the time of delivery, statements such "subject to inspection" are of little value.

The best practice, of course, is for the consignee to very carefully inspect the goods and the packaging for any visible crushing, dents, etc. and note an exception on the delivery receipt. Otherwise the claim falls into the category of "concealed damage" with a greater burden on the claimant to prove that the damage could not have occurred after delivery.

FREIGHT CHARGES – BROKER COLLECTING ON THIRD PARTY DROP SHIPMENT

Question: We are a broker and we ran into a scenario where our customer is neither the shipper nor the consignee (drop shipment) and the freight bill is marked "Prepaid" 3rd party (logistics company). Shipper used our bill of lading and did not sign section 7 (non-recourse provision).

1. Can we legally go after the shipper and consignee for payment of freight as a freight broker? We already paid the carrier but we were not paid by our customer.

2. Customer sends us a copy of a "hold harmless and indemnify" letter stating consignees are not liable for claims, liens and obligations. We have no such agreement in place with the customer or consignees. Is there any recourse if we continue to pursue payment from shipper or consignee?

Answer: If the carrier had not been paid, it would have the right to seek payment from the shipper or consignee named on the bill of lading. However, your only contract is with the customer, and not with the shipper or consignee, and you extended credit to the customer in the expectation of being paid by the customer, so your legal recourse is against the customer.

That said, you can try to collect from the shipper or consignee, explaining that you paid the carrier and that they received the benefit of the carrier's services, but it is likely that they will refuse payment if they have already paid your customer for the price of the goods and the transportation charges.

CCPAC NEWS

CCPAC

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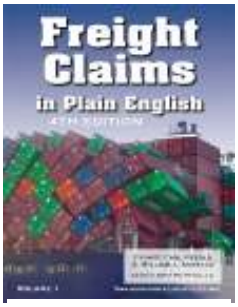

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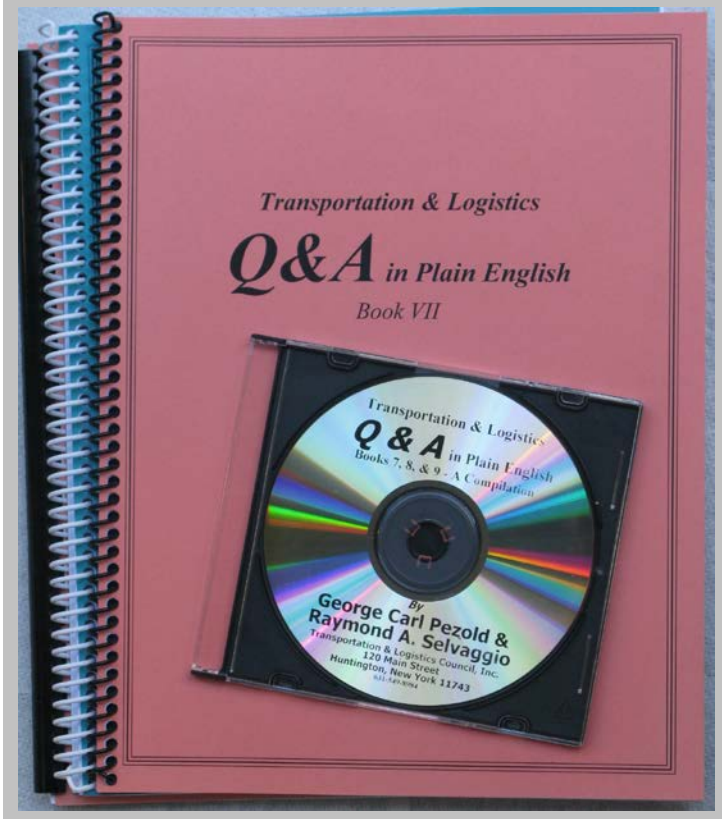

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