TRANSDIGEST

Transportation & Logistics Council, Inc.

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EDITORIAL

ABF PUBLISHES CALIFORNIA SURCHARGE

by George C. Pezold, TLC Executive Director

California means different things to folks - Hollywood, Silicon Valley, the Golden Gate Bridge, great wines. Few realize that agriculture is one of its largest industries, and that it provides most of the fresh fruits, vegetable and nuts that feed the Nation. It also has major problems with air pollution and water supply. Whether truly effective or misguided, efforts to combat air pollution have resulted in the most stringent regulations in the country applicable to motor vehicle emissions of all kinds.

Over the years we have reported on the efforts of the Ports of Long Beach and Los Angeles to impose a ban on older trucks serving the ports, and the regulations of the California Air Resources Board that establish strict performance standards for trucks and trailers equipped with a "Transportation Refrigeration Unit" (TRU). There can be little question that measures such as these have an economic impact on the trucking industry and the public, including capacity shortages and increased costs.

Carriers have long charged more for transporting goods to and from places that are difficult or more expensive to serve. They have published arbitraries or surcharges for large cities to cover congestion, tolls, etc. or have higher rates for certain areas of zip codes. But here is a new one!

Thanks to Bob Walters of Freight Management, the Council recently learned that ABF Freight published a tariff surcharge of $5.92 per shipment, originally effective March 4th, but now effective April 1st, for all shipments to or from the State of California, and it apparently applies to all shipments regardless of size or weight. ABF's tariff surcharge item provides as follows:

> Item 162 – California Compliance Surcharge
> Shipments originating from and/or destined to the state of California will be subject to a charge of $5.92 per shipment due to higher costs, including but not limited to compliance with California state regulations. The charges provided in this item will not apply to shipments moving under a Volume Price Quote, a Timekeeper Price Quote, a TurnKey Price Quote or a U-Pack Quote.

Initially, it was thought that the "emergency increase" was related to the cost of compliance with California's strict emission requirements for motor vehicles. However, Eddie Sorg, Vice President - Yield Management for ABF Freight, states that it is a result of a recent addition to the California Labor Code that "imposes significant new burdens on employers that pay employees on a piece-rate basis".

The legislation, Assembly Bill No. 1513, approved October 10, 2015, and effective January 1, 2016, it titled "Employment: workers compensation and *piece-rate compensation*". The legislative counsel's digest states:

> This bill would require the itemized statement provided to employees compensated on a *piece-rate* basis to also separately state the total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period, and the total hours of other nonproductive time, as specified, the rate of compensation, and the gross wages paid for that time during the pay period.
>
> The bill would require those employees to be compensated for rest and recovery periods and other nonproductive time at or above specified minimum hourly rates, separately from any piece-rate compensation. The bill would define "other nonproductive time" for purposes of these provisions to mean time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis. Because a knowing and intentional violation of these requirements would be a crime, the bill would impose a state-mandated local program.

Readers may wonder, as I did, how this legislation could possibly apply to truck drivers?

The legislation conspicuously fails to define "piece work", and this terminology would normally be thought to relate to manufacturing jobs such as assembling products, sewing garments, or possibly (in California) picking baskets of fruit. Why then has ABF Freight apparently assumed that it applies at all to truck transportation to or from the State of California?

We would assume that company truck drivers (employees) are usually paid on an hourly basis, and would necessarily be compensated for both driving and non-driving time, such as lunch breaks and for any rest periods, etc. that are mandated by the federal hours-of-service ("HOS") rules.

And, owner-operators would be "independent contractors", not "employees" of ABF Freight, so the legislation should not even apply to them. Also, owner-operators are typically compensated on a point-to-point flat rate or on a mileage rate, but regardless of the formula used, a carrier using owner operators should be entitled to assume that the contract price includes and covers any federally mandated breaks or rest periods.

The ABF surcharge also fails to recognize the difference between less-than-truckload ("LTL") and truckload ("TL") pricing. Rates for LTL shipments involve the class of the commodity, the value, weight, density, packaging, etc. as well as the distance. On the other hand, shippers, intermediaries like brokers and 3PL's usually negotiate TL rates with carriers that are may be either point-to-point (between areas, zip codes, etc.) or on a mileage basis.

Even assuming, for the sake of argument, that the California law might possibly apply to employee drivers that are compensated on a flat rate or mileage basis for TL shipments, it would seem that the surcharge should not apply to LTL shipments. Also, how did ABF determine that the appropriate surcharge should be $5.92?

Last, but not least, we note that laws like this one have been challenged pursuant to a federal law that "preempts" certain types of state laws and regulations. This provision, originally included in the Federal Aviation Administration Authorization Act ("FAAAA"), and later in the ICC Termination Act ("ICCTA") at 49 U.S.C. § 14501 reads in the relevant part as follows:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

The publication of the ABF Freight surcharge would seem to be proof this new law directly impacts "a price, route, or service" of motor carrier transportation in the State of California. At this time it remains to be seen whether ABF Freight or the trucking industry intends to challenge the law, and we have heard nothing further from Mr. Sorg at ABF Freight. So far, it appears that ABF is the only carrier imposing such a surcharge.

ASSOCIATION NEWS

STILL TIME TO REGISTER FOR TLC'S 42ND ANNUAL CONFERENCE

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

Jeff Silver, CEO of Coyote Logistics, will be the Keynote Speaker on Monday, May 2nd. Coyote Logistics, headquartered in Chicago, IL, was founded in 2006 and under Silver's leadership became one of the most innovative, fast-growing third-party logistics service providers in North America. Coyote was purchased in 2015 by UPS for $1.8 billion in order to expand its customer base and provide a seamless supply chain solutions portfolio from multi-modal freight shipments to small-package delivery.

Tuesday's Guest Luncheon Speaker will be Daphne Y. Jefferson, Deputy Administrator for the Federal Motor Carrier Safety Administration. Ms. Jefferson became the Agency's Deputy Administrator in February 2015 after serving as the Counselor to the Chief of Staff at the U.S. Department of Transportation in the Office of the Secretary. She had previously served as the Deputy Assistant Secretary for Administration in OST, and as the Associate Administrator for Administration for the FMCSA at DOT, where she provided executive oversight of management services and training in support of the FMCSA mission.

TLC's Annual Conference is regarded as the best educational value in the industry, and the educational sessions are presented by top experts and experienced practitioners who give attendees practical information and advice that they can take back and use in their everyday business. The program touches on all modes of transportation and addresses a wide range of topics including hazmat shipping, transportation of food and drugs, preparing RFP's, transportation insurance, supply chain security, intermediaries, international multi-modal shipping, freight claims, a panel of leading transportation attorneys, and much more.

This year's Annual Conference will also feature five optional full-day pre-conference seminars offered on May 1, 2016, the Sunday before the conference - Contracting for Transportation & Logistics Services, Freight Claims in Plain English, Transportation, Logistics and the Law, Multi-modal Transportation of Hazardous Materials and The National Motor Freight Classification.

Full details of the program and the optional seminars are available on the Council's website: www.TLCouncil.org.

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

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

ALBUQUERQUE - BEYOND THE CONFERENCE: To find out what to do in Albuquerque, the Albuquerque Convention & Visitors Bureau (http://www.visitalbuquerque.org/) has a travel guide that can be obtained through the mail or as an interactive version online, by visiting http://www.visitalbuquerque.org/travel-tools/guides/. Last month we highlighted several area activities. , Amongst the highlights: getting high by taking a hot air balloon ride (Albuquerque is the hot air ballooning capital of the world) or the aerial tramway up the Sandia Peak; try your luck gambling at local casinos; immerse yourself in the southwest culture at a variety of galleries, restaurants and museums, including a rattlesnake museum and a museum of turquoise; or simply enjoy yourself outdoors hiking, visiting historic Route 66, playing golf or even rafting on the Rio Grande. The website also has a variety of discount coupons from some 70 participating New Mexico businesses that can be downloaded.

The Visitor's Bureau website provides a wealth of information that will help you plan your visit, that includes such relevant matters as altitude (over 5,000 feet), low humidity and that the weather for May averages a high of 79 degrees F with a low of 50 degrees F, a 32% average humidity and a 76% chance of sunshine.

SPONSORSHIPS, DOOR PRIZES & EXHIBITORS

Sponsorships: Among the traditional amenities of the Transportation & Logistics Council's ("TLC") Annual Conferences are the Hospitality Suites on Sunday and Monday night of the Conference. Complimentary hors d'oeuvres and cocktails help create a welcoming atmosphere for attendees, an

opportunity to meet both old and new friends, and to network with other transportation professionals. These Hospitality Suites are funded entirely by contributions from our sponsors, and we would like to ask you to make a contribution. We have three sponsorship levels: Bronze $300, Silver $500 and Gold $1000. Your company name will be prominently displayed at the entrance to the Hospitality Suite area, and will be published in the conference program, the TRANSDIGEST and on the TLC website. A sponsorship form is attached, and you can email, fax or mail it to the address on the form.

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

Exhibitors: See attached information sheet.

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

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

NEW MEMBERS

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

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CLASSIFICATION

FUTURE COMMODITY CLASSIFICATION STANDARDS BOARD ("CCSB") DOCKETS

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

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

MOTOR

CARRIER SAFETY FITNESS DETERMINATION

In January the Federal Motor Carrier Safety Administration ("FMCSA") published in the Federal Register a notice of proposed rulemaking ("NPRM") designed to enhance the Agency's ability to identify non-compliant motor carriers. The Safety Fitness Determination ("SFD") NPRM would update FMCSA's safety fitness rating methodology by integrating on-road safety data from inspections, along with the results of carrier investigations and crash reports, to determine a motor carrier's overall safety fitness on a monthly basis.

The proposed SFD rule would replace the current three-tier federal rating system of "satisfactory-conditional-unsatisfactory" for federally regulated commercial motor carriers (in place since 1982) with a single determination of "unfit," which would require the carrier to either improve its operations or cease operations. On March 8, 2016 the FMCSA extended the original comment period from March 21, 2016 to May 23, 2016, with reply comments due by June 23, 2016.

There are many implications from this proposed rule and so far there have been 44 comments submitted. Review the comments submitted by the Transportation & Logistics Council, Inc. attached at the end of this TRANSDIGEST. Visit https://www.regulations.gov/#!docketDetail;D=FMCSA-2015-0001 to review the proposal and other comments submitted, or to submit a comment.

RULE PROPOSED TO REQUIRE MORE TRAINING FOR CDLS

On March 7, 2016 the Federal Motor Carrier Safety Administration ("FMCSA") published a notice of proposed rulemaking ("NPRM") and request for public comments in the Federal Register regarding a new rule that requires truck drivers to spend more time behind the wheel before they can take their skills tests for obtaining a commercial driver's license ("CDL"). The proposed rule also creates additional hurdles for CDL drivers who have lost their license for malfeasance to have it reinstated.

According to the NRPM:

> The NPRM proposes a Class A and Class B CDL core curriculum; training curricula related to hazardous materials (H); passenger (P); and school bus (S) endorsements; and a "refresher"

training curriculum. The core, endorsement, and refresher curricula generally are subdivided into theory and behind-the-wheel (BTW) (range and public road) segments. There is no proposed minimum number of hours that driver-trainees must spend on the theory portions of any of the individual curricula. The NPRM proposes that Class A CDL driver-trainees must receive a minimum of 30 hours of BTW training, with a minimum of 10 hours on a driving range. Driving on a public road would also be required, and Class A CDL driver-trainees may fulfill this requirement by either (1) driving 10 hours on a public road, or (2) 10 public road trips (each no less than 50 minutes in duration). Class B CDL driver-trainees must receive a minimum of 15 hours of BTW training, with a minimum of 7 hours of public road driving. And irrespective of the number of hours of BTW training, the training provider must not issue the training certificate unless the student demonstrates proficiency in operating the CMV. The NPRM also proposes that a CDL holder who has been disqualified from operating a CMV must successfully complete refresher training.

Comments are due by April 6, 2016. Visit https://www.federalregister.gov/articles/2016/03/07/2016-03869/minimum-training-requirements-for-entry-level-commercial-motor-vehicle-operators to review the rule and for information on filing comments.

OCEAN

CONTAINER WEIGHING RULE UPDATE

Officially referred to as the Verified Gross Mass ("VGM") regulations, approved by the International Maritime Organization ("IMO") as an amendment to the Safety of Life at Sea ("SOLAS") Convention, the response to the requirement for mandatory container weighing continues to morph (see TRANSDIGESTS 166, 172, 188 & 213-216 for prior reports).

Underlying the entire matter regarding VGM certification is the simple fact that no matter what country a ship is departing from, container carriers cannot load a container for which it has not received a VGM certification from the shipper. The reason is that to do so would leave the ship out of compliance with rules of its own flag state and its insurers, leaving it vulnerable to liability in the event of an accident.

In order to avoid supply chain disruption, shippers will need to make adjustments to comply with the new rules by July 1, 2016.

In the U.S. the issue seems to be crystallizing around three particular matters: the practical impossibility of shippers being able to verify the weight of the container they are loading, or tare weight, in order to certify the VGM; the cut-off time to transfer the information; and how terminals are going to handle "non-compliant" containers when they arrive at the gate.

Under the VGM regulations, shippers are required to provide a single, certified weight for containers that includes the weight of the container itself. The problem is that most shippers, while able to provide the weight of the contents loaded into the container, have no way to verify the weight of the container itself, called the tare weight. No one wants to certify the weight of and assume liability for equipment that they do not own, manage, control, and in fact may not ever see.

Addressing this matter, the Ocean Carrier Equipment Management Association ("OCEMA"), a U.S. based association of 18 major ocean common carriers, recently announced that they will not hold exporters legally responsible for verifying the tare weight of the container.

On March 21, 2016 OCEMA released its VGM Best Practice guide and VGM Process Map. Shippers have two methods to determine VGM, (i) either weigh the entire loaded container, or (ii) weigh what is put into the container and add it to the tare weight of the container. Pursuant to the Practice Guide:

> In accordance with SOLAS guidelines, if using method (ii), Shippers may use the container tare weight marked on the container. OCEMA's position on tare weights is consistent with that of the IMO in that a Shipper may rely on the tare weight printed on the container when using method (ii) to determine VGM.
>
> To facilitate Shipper operations, some ocean carriers have indicated that they may provide a database of tare weights on their websites. However the tare weight is provided, it is acceptable for Shippers to rely upon the tare weight being made available by the Ocean Carrier. The Shipper would not be certifying the accuracy of the container tare weight printed on the container.

The Practice Guide (http://ocema.org/docs/OCEMA%20VGM%20Best%20Practice.pdf) also addresses how and when the VGM certification is to be transmitted along with how that information is to be processed after receipt. According to the Guide:

> WHEN must VGM be received by Ocean Carrier ("VGM Cutoff")?
>
> - For VGM submitted electronically: As a general practice, when the receiving cutoff time is determined to be at the close of the business day, VGM Cutoff will be at noon of that day. Regardless of the receiving cutoff time, Carrier will advise the Shipper of VGM Cutoff at time of booking.
> - For VGM submitted through alternative methods, VGM Cutoff will be determined by the Ocean Carrier, but will typically be earlier than for electronic submissions to allow time for processing.
> - Similar to the concept of "No Docs/No Load" that is already in place, if the Ocean Carrier does not receive VGM prior to the VGM Cutoff time, the container cannot be loaded aboard the vessel. Instead, it will be sidelined until the next available sailing by which time the Shipper must have made arrangements for the provision of VGM. The treatment of any costs or other circumstances arising out of a Shipper's failure to timely provide VGM will be a matter for individual Ocean Carriers to determine in accordance with their applicable tariffs and service contracts.

The OCEMA also published a process map, outlining the various steps of the VGM submission, available online at: http://ocema.org/docs/OCEMA%20VGM%20Process%20Map.pdf.

The last of these issues, what happens when/if a container arrives at the terminal without a VGM certification, is less clear. Containers without the proper documentation can not be loaded on a vessel, so a marine terminal operator ("MTO") will either have to "sideline" the container on site, as mentioned in the OCEMA Guide above, provide weighing/certification services, or turn the container away. Which of these choices a MTO follows will be fact specific, dependent on whether the MTO has the space to sideline non-compliant containers on site and whether it has the equipment and willingness to provide weighing services. Turning containers away at the gate is the least desirable outcome and would result in the most problems.

QUESTIONS & ANSWERS

By George Carl Pezold, Esq.

FREIGHT CHARGES –BROKER'S OBLIGATION TO PAY WHEN CLAIM DISPUTED

Question: Hi, I have a question regarding damaged/refused freight.

We are a carrier and accepted a refrigerated produce load of berries from a broker. The bill of lading instructs the temperature to be set at 32 degrees F. There were no issues during transit with the temperature unit. At the point of delivery, the receiver tested temperature with a portable temperature recorder. The temperature recorded showed the temperature at 32.5 degrees F.

We took photos of the receiver's portable recorder that shows the accurate temperature. The receiver rejected the freight and said because some of the produce was frozen due to the refrigerator unit. The receiver also claims that unit operated continuously between the temperatures of 14 and 26 degrees F. We believe that is incorrect.

The receiver requested a U.S. Department of Agriculture ("USDA") inspection. This inspection showed a temperature recording between 33 and 35 degrees, and nothing between 14 and 26 degrees. The receiver claims that the refrigeration unit has a loose chute and that caused the freezing to occur. Service history of the unit showed no problems with the unit or chute and after the broker requested an inspection by the manufacturer, Thermo King, it found no problems with the unit or chute.

The broker requested that we re-deliver the load to another customer and it said it would compensate us.

The freight was re-delivered and issued a clean bill of lading/proof of delivery. We submitted our invoice for payment and now the broker is refusing to make payment. We contacted the broker and it said the shipper filed a claim on the freight and so now it is refusing to pay us. The broker also demanded that we file a claim through our insurance. We refused to do that and feel the broker is obligated to make payment for freight transportation as contracted. Several demands for payment were sent to the broker.

The broker has submitted a demand for payment to us for the claim filed on the broker by the shipper. Are we entitled to our freight charges and are we obligated to pay the shipper's claim

Answer: First of all, the broker's obligation to pay the freight charges is completely independent of any potential claims for loss or damage to the shipment. Assuming that you had a rate confirmation or other agreement as to the freight charges, the broker has a contractual obligation to pay your freight charges. If it does not, you have recourse to the broker's surety bond, or if necessary you can sue the broker for your charges.

Regarding the claim, it isn't clear whether the shipper has actually filed a claim against your company, or whether the broker may be submitting a claim on behalf of its customer. If you have actually received a claim in writing you should respond to that claim, and probably should turn it over to your cargo insurance company.

FREIGHT CHARGES – SETTING OFF ADDITIONAL DEMANDS AFTER CLAIM PAID

Question: We had a truckload shipment rejected on 08/13/15, however there is a billing dispute regarding the claim amount. The timeline is as follows:

Load rejection occurred on 08/13/15.
Claimant informed us of additional market cost on 08/31/15.

Claim was filed and submitted to our claims department 9/09/15, but did not include the additional market cost.
Payment for the claim was issued on 11/13/15.
Check was deposited by Claimant on 11/17/15.
On 12/04/15, claimant attempted to deduct the additional market cost directly from an unrelated active invoice.

Considering the timeline of events, are the deductions valid and/or could adjustments still be made to this claim?

Answer: If a check in payment of a claim is sent to the claimant and is deposited to its account, it is generally considered to be an "accord and satisfaction", i.e., a final settlement of the claim. Based on your description of the facts, I don't see how the claimant can now deduct additional amounts from your invoice.

Of course, if it is a good customer you may have to make a business decision.

FREIGHT CLAIMS – CARRIER TIME TO RESPOND

Question: I recently had to have a motorcycle engine shipped to my home garage via a freight carrier. After the engine was delivered, I discovered that someone had driven a forklift into the side of it, completely destroying the functionality of the engine. When I submitted my claim for reimbursement I was told that it would take a minimum of 60-90 days to address and resolve my claim. This seems unreasonably long to me. Is there a statutory limitation on resolving these types of claims?

Answer: The Federal Motor Carrier Safety Administration ("FMCSA") regulations at 49 CFR Part 370 do provide time limits for the disposition of claims:

> 49 C.F.R. 370.9 Disposition of claims.
>
> (a) Each carrier subject to 49 U.S.C. subtitle IV, part B which receives a written or electronically transmitted claim for loss or damage to baggage or for loss, damage, injury, or delay to property transported shall pay, decline, or make a firm compromise settlement offer in writing or electronically to the claimant within 120 days after receipt of the claim by the carrier; Provided, however, that, if the claim cannot be processed and disposed of within 120 days after the receipt thereof, the carrier shall at that time and at the expiration of each succeeding 60 day period while the claim remains pending, advise the claimant in writing or electronically of the status of the claim and the reason for the delay in making final disposition thereof and it shall retain a copy of such advice to the claimant in its claim file thereon.

FREIGHT CHARGES – CARRIER'S RIGHT TO DETENTION CHARGES

Question: We are a carrier and picked up a shipment for a broker that was consigned to...according to both the individual we booked the load with AND the load/rate confirmation we signed/agreed to...a 24 hour receiver with no delivery appointment required for delivery. However, upon arrival to the consignee the next day, we were advised by the consignee that a delivery appointment was in fact required to unload the material we were delivering.

After advising the broker that our delivery attempt had been refused by the consignee, the broker asked us to wait outside and he would "see what he could do". Finally, after sitting outside the consignee's facility all day, we were advised the broker had secured a delivery appointment for 2 days later.

My question is...what recourse/rights/options does a carrier have to demand adequate compensation when a load has been refused due to a failure on the shipper or broker's part? We were offered an apology

and $200/day for sitting 54 hours, and as far as I know we had little recourse other than taking what was offered. This is not an isolated incident, and I'm sure other carriers have had the same issue.

Answer: Many carriers have provisions in their rules tariff that cover detention of vehicles and/or vehicles with drivers (typically an hourly rate after a certain amount of "free time"). Since the carrier's tariffs are incorporated by reference in most standard bills of lading, these provisions are usually enforceable.

Apparently your company does not publish a rules tariff. If not, then you should always include provisions in your rate quotes or rate confirmations as to the amount of free time and the detention charges. You should also be careful to make sure that any requirements for delivery by appointment or at a particular time are clearly spelled out in your agreements with the shipper or broker.

FREIGHT CLAIMS – MEASURE OF DAMAGES: CARRIER DEDUCTING PERCENTAGE

Question: When filing a claim does the carrier have the right to take 20% off the top as they say we're making profit twice? Also, some carriers will not pay invoice value - instead they will pay between $2.00 - $5.00/lb. for office furniture depending on the items.

Answer: You have a number of questions.

First, if a claim is for loss or damage to a shipment of goods that have been sold to a customer, the proper measure of damage is generally the invoice price to the customer. The reason is that this is the amount the shipper/seller would have received if the shipment was delivered in good order and condition. The seller's "cost" is not a proper measure of damage.

Second, it appears that you are referring to a limitation of liability. Many carriers publish liability limitations in their rules tariffs that limit their liability to a specific maximum amount (dollars per pound, etc.), and also have liability limits for specified commodities (like office furniture). It is the shipper's responsibility to find out what those limitations are before using the carrier's services.

Lastly, disputes over the proper measure of damage and liability limitations can be avoided by having a good transportation agreement between the shipper and the carrier.

CARRIERS – MARKINGS ON VEHICLES

Question: Can a registered property broker have a "straight truck" with its company logo on the box of the straight truck as long as the cab of the vehicle states "XYZ Carrier's" name? Does it make any difference if the broker is also a freight forwarder?

Answer: Motor carriers that are registered with the Federal Motor Carrier Safety Administration ("FMCSA") are required to identify their vehicles in accordance with the regulations at 49 C.F.R. § 390.21 covering commercial motor vehicles ("CMVs"):

> Marking of CMVs, as follows:
>
> (a) General. Every self-propelled CMV, as defined in § 390.5, subject to subchapter B of this chapter must be marked as specified in paragraphs (b), (c), and (d) of this section.
>
> (b) Nature of marking. The marking must display the following information:
>
> (1) The legal name or a single trade name of the motor carrier operating the self-propelled CMV, as listed on the motor carrier identification report (Form MCS-150) and submitted in accordance with § 390.19.

(2) The motor carrier identification number issued by the FMCSA, preceded by the letters "USDOT".

(3) If the name of any person other than the operating carrier appears on the CMV, the name of the operating carrier must be followed by the information required by paragraphs (b)(1), and (2) of this section, and be preceded by the words "operated by."

(4) Other identifying information may be displayed on the vehicle if it is not inconsistent with the information required by this paragraph.

The regulations do not prohibit a broker or a shipper from advertising with its name or logo on the side of a truck. However, this practice is questionable, since it could increase the possibility that the broker or shipper could be exposed to liability, for example, in the event of a highway accident involving personal injury or property damage to third parties.

FREIGHT CLAIMS – CONTAMINATED TRAILER WITH FOOD PRODUCT

Question: On 01/07/16 we received notification that our trailer containing food grade product was being rejected due to human waste in the trailer. There are some complications finding the liable party:

Load picked up on 12/30/15 and delivered 01/07/16 via IML (rail)
Upon arrival and opening the trailer, the DC noticed human waste near the doors, immediately sealing and rejecting the shipment; seal was intact
Third party investigators verified that the seal was not tampered with prior to delivery on 01/07/16
Shipping closes and seals trailer doors prior to allowing driver to inspect

Shipping dock cameras only keep record for 4 days, given the length of transit the shipping video was erased prior to the shipment delivering on 01/07/16

Carrier states the container was inspected and food grade upon arrival but does not have documentation such as a wash out receipt or photos of the trailer to verify it was food grade upon arrival for pick up.

Who is at fault, the shipper or the carrier?

Answer: From your description of the facts it appears that the shipper loaded and sealed the trailer at origin without the driver having opportunity to inspect the load before it was sealed, and that the shipper's original seal was intact when the trailer was delivered and the doors were opened. Under those circumstances there would normally be a presumption that the "human waste" could not have entered the trailer during transit and while the shipment was in the possession of the carrier.

FREIGHT CLAIMS – CARRIER'S LIABILITY AND OBLIGATION TO UNLOAD

Question: Our driver had a mishap delivering a container to the customer. At the dock, the ramp went down. One of the customer's workers opened the seal on the container and then helped my driver open the container. They saw that the container was full and it might not be right to back it down the ramp. While the driver was backing up the some of the cargo fell out. The customer blamed it on the driver while we feel it was clearly their fault, as their worker did nothing to warn or stop the driver.

The customer told us to send labor to clean up and pick up the cargo which had fallen out. I didn't have anyone in labor to help me so I took my family (some adult men in the family) and picked up the cargo. When we finished picking up and boxing over 1000 cans of sardines, the customer told us that we will have to unload the rest of the cargo by ourselves, which had tipped over when the driver slammed the brakes when the cargo fell out.

The remaining cargo consisted of over 2400 boxes containing 24 cans per box of sardines. We started doing that and when we asked why couldn't they help instead of just watching us, they were like "why don't we call the cops and file a claim". Then they said that we will have to pay for the damages, which is over $5k.

The question is, are we supposed to do this? Are we supposed to pick up the cargo unload the 80% of the cargo which is not damaged and on top have to pay over $5k?

Answer: Assuming that your contract provided that this was a "carrier unload" shipment, your company would presumably be liable for any loss or damage to the goods during unloading (until the actual delivery was completed).

CARRIERS – REQUIRING DRIVERS TO RETURN TO BASE

Question: We are a regional company running in 18 states and have two terminals, in VA and GA. The Georgia Terminal in Ellenwood is the Corporate Terminal where we hold orientation and seat drivers in new trucks. Do you have any recommendations on how to hold drivers responsible for returning the trucks to the Ellenwood terminal even if they live out of the state of Georgia? We are considering setting up an escrow in the amount of $750.00 to cover the recovery.

Answer: I assume that when you say "drivers" you are referring to owner-operators. If so, you may be able to include specific provisions in your owner-operator lease that cover this situation and also provide for an escrow. You should consult the Federal Motor Carrier Safety Administration ("FMCSA") regulations at 49 CFR 376.12 Written lease requirements available online at https://www.fmcsa.dot.gov/regulations/title49/section/376.12.

FREIGHT CLAIMS – VERMIN IN SHIPMENT OF FOOD CONTAINERS

Question: We manufacture plastic containers for food items and have strict regulations that must be followed. All carriers working with us are aware of this.

We sent a shipment to our customer with one of the carriers we use. The customer sent an email, they refused the shipment due to rats on the truck and requested that we replace the shipment ASAP so they wouldn't run out of product.

The carrier is refusing to acknowledge there were rats on their truck and want to return the product to us & charge us storage. They say that there were no rats on the truck and the customer's claim is unjustified.

I sent them the customer's email with the question why would the customer refuse a shipment that they want and need?

I asked that the shipment be destroyed and informed them I would file a claim.

They are not cooperating and insist the customer's claim is untrue.

Please advise what I can do to resolve this.

Answer: It is quite common for receivers of food and food-related products to refuse or reject product if there is evidence of possible contamination by insects, rodents, etc. This is because it would be considered an unacceptable risk to allow the product to enter the market for human consumption, or that it would be impossible to adequately sample and test the entire product to ensure that the quality had not been compromised.

There is no question that foods or food-related products like food packaging materials could be damaged and become unsuitable for their intended use if they subject to contamination. Assuming that the carrier has

notice that the goods are foods or food-related products and/or intended for human consumption, it should have a duty to provide suitable equipment and to protect the goods against such contamination and should be liable for the damage.

Obviously there is a factual dispute as to whether there were rats in the truck. I would start with a detailed written statement from the consignee as to exactly what was observed and when they were discovered, e.g., when the trailer doors were first opened, etc.

If you are reasonably sure that there were rats in the trailer, I believe you have the right to have the containers destroyed and to file a claim for their value with the carrier.

We usually include specific provisions in our shipper-carrier contracts for shippers of foods and food-related products that cover such situations and make it clear that the shipper has the right to determine whether goods that may have been contaminated or are otherwise unsuitable for their intended use can be destroyed without salvage, etc.

RAILROADS

NORFOLK SOUTHERN, CANADIAN PACIFIC

The continuing saga of the Canadian Pacific Railway Ltd. ("CP") attempt to acquire Norfolk Southern Corp. ("NS") (TRANSDIGESTS 213, 214, 215 & 216) has now moved to proxy statements. On March 9, 2016 CP announced that it had filed a "preliminary proxy statement with the Securities and Exchange Commission ("SEC"), which outlines the shareholder resolution to be considered at the upcoming Annual Meeting of Norfolk Southern (NS) shareholders requesting that the NS board of directors promptly engage in good faith discussions with CP regarding a business combination."

Visit www.cpconsolidation.com/how-to-vote/ to view CP's preliminary proxy statement and http://www.cpr.ca/en/investors/cp-files-preliminary-proxy-statement-with-sec-for-norfolk-southern-annual-meeting to view the press release.

RECENT CASE

NO CARMACK PREEMPTION WHEN INTENTIONAL MISCONDUCT

The Florida Supreme Court ruled in *Mlinar v. UPS, Inc.* that the state law claims based on intentional misconduct of a carrier were not preempted by the Carmack Amendment.

In this case, an artist, Mlinar, created two valuable oil paintings that were to be shipped from Florida to New York by United Parcel Service, Inc. ("UPS"). The artist had used Pak Mail, a third party retailer to pack and send the paintings. The container arrived in New York empty. When the artist reported the loss to UPS and Mail Pak, she was offered $100 for her uninsured loss.

The plot thickened when some two years after losing the paintings, the artist was contacted by one Aaron Anderson, who had purchased one of the paintings at an auction by Cargo Largo (UPS's lost goods contractor), inquiring as to the value of the painting. After he was informed that it had been appraised at $20,000 he acquired the second painting and offered them both for sale.

Utilizing this information, the artist filed suit against UPS, Pak Mail, Cargo Largo and Anderson alleging conversion, profiting by criminal activity, unauthorized publication of name or likeness, and a claim under Florida's Deceptive and Unfair Trade Practices Act. The trial court dismissed all of Mlinar's claims against UPS, ruling that they were preempted by the Carmack Amendment. The trial court's decision was affirmed on appeal and the plaintiff sought review with the Florida Supreme Court.

The Florida Supreme Court reviewed the status of state and federal case law regarding Carmack preemption, holding "that a state law or common law claim against an interstate carrier of goods is generally preempted by the statute unless the claim alleges conduct or harm that is separate and distinct from the loss of or damage to the goods transported."

Applying this principle to the immediate case, the court noted that the plaintiff's allegations illustrated a course of conduct by UPS and its cohorts that bears, at best, only a tangential relationship to the interstate shipment process. Specifically, the court pointed out that it was UPS itself that adopted or ratified the unscrupulous practices at issue and benefited from them. Plaintiff was not seeking to hold the "carrier liable [] for a negligent yet good-faith loss of goods, but instead for larcenous misconduct by the carrier that was intended to and in fact resulted in the separation of goods from their owner is repugnant to the purpose behind the statute's enactment."

Visit https://scholar.google.com/scholar_case?case=13844674810154909975&hl=en&as_sdt=6,33 to view the case online.

TECHNOLOGY

SOLAR ROADS

A recent article in National Geographic discussed the development of solar roads. The concept is to use some portion of the vast highway network to generate electrical power by using solar panels as a road surface.

According to the article, one U.S. developer stated:

> We are in talks about some very interesting projects, noting the Missouri Department of Transportation wants to install the panels at a rest area along the I-70 highway. They say their tempered-glass panels offer asphalt-like traction, support the weight of semi-trucks, include LEDs for signage, and contain heating elements to melt snow and ice.

The big questions at this time are cost, durability and efficiency.

Visit http://news.nationalgeographic.com/energy/2016/03/160310-will-we-soon-be-riding-on-solar-roads/ to read the article.

ARE YOUR VEHICLES VULNERABLE TO HACKING?

We hear about the "Internet of Everything" as more devices and appliances become connected to the World Wide Web. While there are many benefits to this interconnectivity, there are also potential problems. One in particular is the exposure to hacking.

A recent article on wired.com discussed the possible exposure to hacking of commercial vehicles like trucks, buses and ambulances. In particular, they noted that a Spanish security researcher had:

> used the scanning software Shodan to find thousands of publicly exposed "telematics gateway units" or TGUs, small radio-enabled devices attached to industrial vehicles' networks to track

> their location, gas mileage and other data. He found that one TGU in particular, the C4Max sold by the French firm Mobile Devices, had no password protection, leaving the devices accessible to any hacker who scanned for them.
>
> That allowed [him] to easily look up the location of any of hundreds or thousands of vehicles at any given moment. And [he] believes he could have gone further, though he didn't for fear of violating the law; with a few more steps, he says, an intruder could send commands over the vehicle's internal network—known as its CAN bus—to affect its steering, brakes or transmission.
>
> "Anyone can connect and interact with the device…but what really scares me is that it's connected to the CAN bus of the vehicle" stated the researcher. "These are big vehicles with a lot of mass, and having an attacker manipulate the CAN bus to make one stop in the road would be super dangerous."

Researchers at the University of California at San Diego had done similar research and developed a full CAN attack on a Corvette using a different method that turned on its windshield wipers or disabled its brakes.

Additionally, even without access to a vehicle's CAN bus, unfettered access to a vehicle's TGU could allow bad guys the ability to track and trace a vehicle by its GPS coordinates to target them for a heist.

Visit http://www.wired.com/2016/03/thousands-trucks-buses-ambulances-may-open-hackers/ to view the article.

AUTOMATIC TIRE INFLATION SYSTEM

A California company, Aperia Technologies, has teamed up with Michelin Tire to offer its hub mounted Halo Tire Inflator. Improper inflation can result in "road gators", those chunks of truck tires we see along and on highways when a tire blows apart.

The Halo is a bolt-on, self-contained pump designed to keep tires inflated to the perfect pressure at all times, extending their life and improving fuel economy along the way.

The device attaches to the axle just like the hub odometers often seen on trailers, while a hose connects to the tire valve stem. It's powered via an internal mechanism similar to a self-winding watch, so it doesn't require an external power system or compressor. Set to a specific pressure, the device is connected to the tire's valve stem via a hose and automatically increases or reduces pressure as needed. One Halo can serve up to two tires.

Each Halo costs $299 and was engineered to work at all drive and freewheel positions on most types of Class 7 and 8 trucks, including buses, but isn't currently compatible with the front steering wheels.

Along with preventing blowouts and increasing tire life, it improves fuel economy and reduces downtime for repairs, all of which adds up to $2,400 annual savings per truck, which is about what it costs to install on an 18-wheeler. It can also be installed on buses and other trucks.

Visit http://www.foxnews.com/leisure/2016/03/10/michelin-to-offer-revolutionary-truck-tire-inflation-system/ to view the article.

CCPAC NEWS

CCPAC

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

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

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

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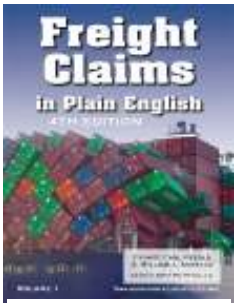
Freight Claims in Plain English, Fourth Ed.

by George Carl Pezold and William J. Augello



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

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

Major topics include:

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2016 TLC 42ND ANNUAL CONFERENCE REGISTRATION FORM

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

	EARLY BIRD SPECIAL (On or Before March 1, 2016)	CONFERENCE REGISTRATION FEE (After March 1, 2016)
☐ TLC MEMBER	$595.00	$695.00
☐ NON – MEMBER	$745.00	$845.00
☐ NON-MEMBER PLUS 1 YEAR TLC MEMBERSHIP INCLUDED	$795.00	$895.00
☐ SPOUSES/GUESTS (select one)	☐ ALL MEALS $275.00	☐ PRESIDENTS DINNER ONLY $100.00

- Multiple registrants from the same company **deduct $50** each after the first registration at full price
- Conference fees include Pre-Meeting Breakfast, Mid-Day Breaks, Luncheons and President's Dinner

OPTIONAL SEMINARS – SUNDAY MAY 1, 2016
(**NOT** included in Annual Conference Registration Fee above)

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FREIGHT CLAIMS IN PLAIN ENGLISH **Includes "Freight Claims in Plain English 4th Ed." (Retail Value $285)**	☐ $550	☐ $625
CONTRACTING FOR TRANSPORTATION & LOGISTICS SERVICES **Includes "Seminar Manual"**	☐ $520	☐ $595
TRANSPORTATION, LOGISTICS AND THE LAW **Includes "Seminar Manual"**	☐ $520	☐ $595
THE NATIONAL MOTOR FREIGHT CLASSIFICATION **Includes 6-month subscription to "ClassIT" software (Retail Value $323/year)**	☐ $520	☐ $595
MULTIMODAL TRANSPORTATION OF DANGEROUS GOODS **Includes "Seminar Manual"**	☐ $520	☐ $595

- **All Seminar fees include Pre-Meeting Breakfast, Mid-Day Breaks, and Luncheon**

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The Transportation & Logistics Council, Inc.

Phone: (631) 549-8984 **120 Main Street, Huntington, NY 11743** **Fax: (631) 549-8962**
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APPLICATION FOR ANNUAL MEMBERSHIP

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

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

All members receive:

- An email subscription to ***TRANSDIGEST*** (TLC's monthly newsletter). NOTE: To receive the printed version of the ***TRANSDIGEST*** by First Class Mail a fee of $50, in addition to applicable membership fee, will apply.*****
- **Reduced rates** for **ALL** educational programs, texts and materials.

New Members also receive:

- A complimentary copy of "**Shipping & Receiving in Plain English, A Best Practices Guide"**
- A complimentary copy of "**Transportation Insurance in Plain English**"
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If you are not presently interested in becoming a member, but would like to subscribe to the **TRANSDIGEST**, you can opt for a 1-Year/Non-member subscription to the newsletter by making the appropriate choice below.

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Transportation & Logistics Council
42nd Annual Conference
Albuquerque, NM
Exhibitor Information

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

Preliminary Schedule

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

Move In/Set up

Sunday	May 1st	9:00 am – 5:00 pm	

Exhibit Hours

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

Move Out

Wednesday	May 4th	12:00 pm – 4:00 pm	

Costs of Exhibiting

$1,200 per booth for TLC members

$1,400 per booth for non-members

10' by 10' booth display with a six (6') foot draped table and two (2) chairs

One complimentary full conference registration per booth rental. Includes all sessions, handouts, continental breakfasts and coffee breaks Monday, Tuesday and Wednesday and lunch on Monday and Tuesday.

The Cost of Exhibiting is for one booth worker. A charge of $200.00 will be incurred for each additional booth worker.

Registration list will be provided to exhibitors.

TRANSPORTATION & LOGISTICS
Council, Inc.

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

Transportation & Logistics Council's 42nd Annual Conference

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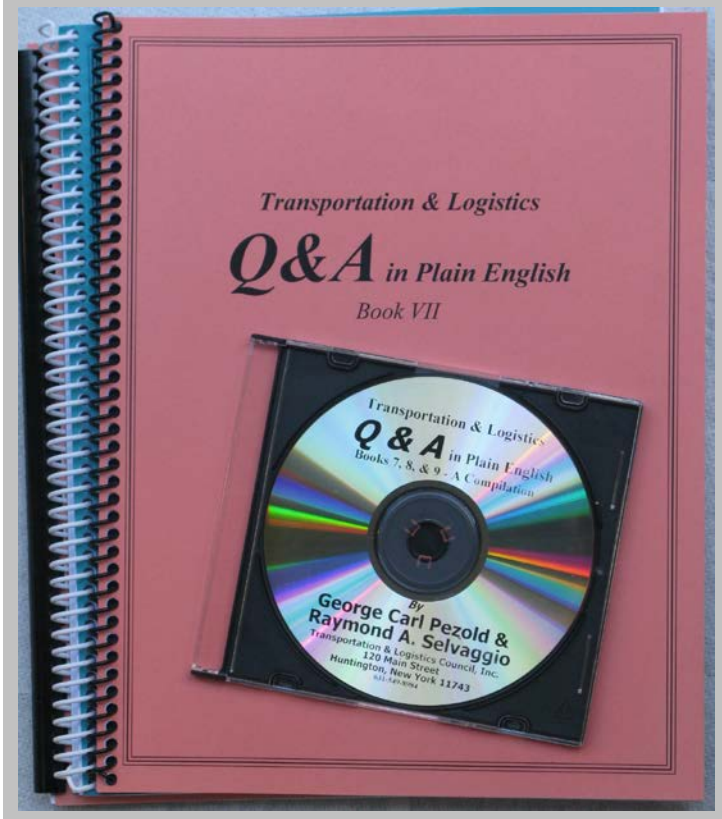

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EDUCATIONAL MATERIALS

Item		Item#	Price
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Contracting for Transportation & Logistics Services (rev. 2001), by George Carl Pezold	**Member**	**576**	**$40.00**
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DEPARTMENT OF TRANSPORTATION
Federal Motor Carrier Safety Administration

Docket No. FMCSA-2015-0001

Carrier Safety Fitness Determination

Notice of proposed rulemaking (NPRM); request for comments.

Comments of the

Transportation and Logistics Council, Inc.

George Carl Pezold, Executive Director...
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120 Main Street
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COMMENTS OF THE
TRANSPORTATION AND LOGISTICS COUNCIL, INC.

1. THE INTEREST OF THE TRANSPORTATION AND LOGISTICS COUNCIL, INC.

The Transportation and Logistics Council, Inc. is a voluntary, not for profit organization of some 300 shippers and receivers of freight nationwide, founded in 1974. The Council's membership includes transportation professionals from companies, both large and small, who are responsible for the shipping, receiving and distribution needs of their companies.

Among the various functions these transportation professionals are responsible for are the purchase of motor carrier transportation services. Therefore, the Council's members have a direct interest in these proceedings.

The Federal Motor Carriers Safety Administration ("FMCSA") has requested comments on the proposal to amend the Federal Motor Carrier Safety Regulations to revise the current methodology for issuance of a safety fitness determination (SFD) for motor carriers.

2. COMMENTS

We believe that the proposed new regulations will have a significant impact on shippers, brokers and third party logistics providers that engage the services of motor carriers and freight forwarders.

For many years purchasers of motor carrier transportation assumed that they could rely on the Safety Fitness Procedures and safety ratings in 49 CFR Part 385 that were promulgated almost thirty years ago.

Starting with the establishment of the "SafeStat" database and ratings in the mid-1990's, and then later with "CSA 2010" and the initiation of the Safety Management System, there was great concern throughout the industry about both the methodology and the use of that data, including "BASIC" scores, by the public in vetting and selecting carriers. This concern arose because of litigation involving accident claims, such as the *Schramm v. Foster*, 341 F.Supp.2d 536 (D. Md. 2004) and *Jones v. CH Robinson*, 558 F.Supp.2d 630 (W.D. Va 2008) cases, and the very real exposure to liability based on some theory of "negligent hiring".

As a result of this uncertainty, as to whether the availability of SMS data would create an obligation on the part of shippers, brokers and third party logistics companies to use the information as part of their "due diligence" in selecting carriers, and pressure from a number of motor carrier groups, the FMCSA agreed to post a disclaimer to clarify the intent and use of the performance data. The SMS disclaimer on the FMCSA website states as follows:

> **USE OF SMS DATA/INFORMATION**
>
> The data in the Safety Measurement System (SMS) is performance data used by the Agency and enforcement community. A ⚠ symbol, based on that data, indicates that FMCSA may prioritize a motor carrier for further monitoring.
>
> The ⚠ symbol is not intended to imply any federal safety rating of the carrier pursuant to 49 USC 31144. Readers should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system. Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways.

Notwithstanding the disclaimer, plaintiffs' lawyers in accident cases have continued to argue that the failure to take this data into account when hiring a carrier constitutes negligence. As such, shippers, brokers and 3PLs continue to face exposure to possible liability for "negligent hiring".

We maintain that it is within the sole purview of the FMCSA and appropriate state agencies to regulate motor carriers and ensure that motor carriers are operating in a safe manner. However, as a result of the “negligent hiring” claims, this regulatory burden has improperly shifted to shippers, brokers and 3PLs.

On December 4, 2015, pursuant to the FAST Act of 2015, the FMCSA announced that much of the CSA data that has been available on its website would no longer be accessible by the general public - at least until the FMCSA has completed further studies, reports and modifications to the satisfaction of Congress. The FAST Act did, however, permit the FMCSA to continue publication of "inspection and violation information submitted to the Federal Motor Carrier Safety Administration by commercial motor vehicle inspectors and qualified law enforcement officials, out-of-service rates, and absolute measures".

The dilemma faced by purchasers of motor carrier transportation is now once again arising in the provisions of the proposed Safety Fitness Determination rules. While the NPRM mentions some of the data in the present SMS system that is available to the public on the FMCSA website, it omits any mention of data – other than the SFD determination of "UNFIT" – that would continue to be available to the public. For example, if "crash" data continues to be shown on the FMCSA website, how would

shippers or brokers be expected to interpret such reports when they know nothing about the facts involved or what parties may be at fault?

The bottom line is that the NPRM fails to state whether or not the public can rely solely on an SFD determination that carrier is "fit" or "UNFIT" in vetting or hiring a motor carrier, without fear of exposure from "negligent hiring".

These omissions are an invitation for more of the vexing litigation that has plagued the industry.

3. CONCLUSION

In view of the foregoing, the Council believes that the final regulations, when published, must make it crystal clear that purchasers of motor carrier transportation need only verify whether the carrier has been declared "UNFIT", and have no responsibility to independently examine the safety fitness of a motor carrier beyond this determination, or any liability if they have done this.