

## CONCEALED DAMAGE AND SHORTAGE CLAIMS

By George Carl Pezold

### The Basics

**Concealed Damage or Shortage is defined as damage or shortage that is not discovered (or could not be discovered) until after the carrier has completed delivery of the goods. It can occur in three ways: (1) the goods were already damaged or were not loaded on the truck at origin; (2) there was damage, theft, pilferage, etc. while the goods were in the possession or control of the carrier, or (3) the loss, damage or shortage occurred after the carrier had completed delivered of the goods to the consignee.**

Although it is always a good practice for the consignee to inspect a shipment and to make a notation as to any loss or damage that can be observed at the time of delivery on the bill of lading or delivery receipt, often this is not, or cannot be done. Unfortunately, many carriers will decline a claim if there is a clear delivery or clean delivery receipt, or if the loss or damage is not reported within a certain number of days.

### Carrier Liability and Clear Delivery

A common carrier is liable for loss, damage or delay to goods in its possession, with very limited defenses such as an Act of God, act or default of the shipper, and it also has the burden of proving that it is free from any negligence that may have caused or contributed to the loss. The claimant has a relatively simple burden of proof – that the shipment was tendered in good order and condition to the carrier at origin and there was loss or damage upon delivery. The main difference with any "concealed" damage claim is that the claimant must also prove that the damage or shortage existed at the time of delivery and could not have occurred afterwards.

A "clear" delivery receipt signed by the consignee is usually considered good evidence that the shipment was delivered in good order and condition. However, just because there is a "clear" delivery is not a valid basis for declining a claim.

For example, there are federal regulations at 49 CFR Part 370 that require the carrier to "promptly and thoroughly investigate" the facts, not merely disallow the claim because of a "clear" delivery receipt:

49 C.F.R. 370.7 Investigation of claims.

(a) Prompt investigation required. Each claim filed against a carrier in the manner prescribed in this part shall be promptly and thoroughly investigated if investigation has not already been made prior to receipt of the claim.

There are also provisions regarding inspections in the National Motor Freight Classification that are binding on most LTL carriers that deal with the carrier's obligation to inspect all loss or damage claims – regardless of whether there is "clear" delivery receipt:

#### Item 300140 INSPECTION BY CARRIER

Inspection by carrier will be made as promptly as possible and practicable after receipt of request by consignee. Inspection will be made within five normal work days after receipt of request from consignee, excluding Saturdays, Sundays and holidays. A day will be considered as the passing of twenty four (24) hours from 9 A.M., local time from the date of receipt of request for inspection. Inspection by carrier will include examination of the damaged merchandise, the shipping container, and any other action necessary to establish all facts. If a shortage is involved, inspector will check contents of package with invoice, weigh the shipping container and contents, or conduct any other type of investigation necessary to establish that a loss has occurred. In either case inspection will be limited to factual report. Consignee must cooperate with

carrier in every way possible to assist in the inspection. A written record of carrier's findings will be made at least in duplicate. The original of the report will be given the consignee for claim support. Any inspection report issued must be incorporated in claim file.

### **Notification of Concealed Loss or Damage – Time Limits**

There is no law or regulation that specifies any particular time limit for notification of concealed damage or shortage. However, for most LTL carriers there is a contractual limit found in a tariff or in the National Motor Freight Classification that is incorporated by reference through the Uniform Straight Bill of Lading. For many years the NMFC required notice of concealed damage within 15 days. That was shortened to 5 days in 2015, and additional requirements in connection with such claims were added. Item 200135-A reads as follows:

#### ITEM 300135-A REPORTING CONCEALED DAMAGE

- (a) When damage to, or loss of, contents of a shipping container is discovered by the consignee that could not have been determined at time of delivery, it must be reported by the consignee to the delivering carrier upon discovery.
- (b) Reports must include a request for inspection by the carrier's representative.
- (c) Notice of loss or damage and request for inspection may be given by telephone or in person, but in either event must be confirmed by  $\Delta$  a written or electronic communication.
- $\Delta$  (d) While awaiting inspection by carrier, the consignee must hold the shipping container and its contents in the same condition they were in when damage was discovered, insofar as it is possible to do so.
- (e) Unless otherwise specified by the carrier, notice of loss or damage should be provided to the carrier within five (5) business days from the date of delivery.
- (f) If five (5) business days, or such other period as specified by the carrier, pass between the date of delivery of the shipment by carrier and date of report of loss or damage and request for inspection by consignee, it is incumbent upon the consignee to offer reasonable evidence to the carrier's representative when inspection is made that loss or damage was not incurred by the consignee after delivery of shipment by carrier.
- (g) Reasonable evidence includes, but is not limited to:
  - 1. Identifying the party(ies) responsible for unloading,
  - 2. Identifying the chain of custody of the article, including prior transportation by any mode,
  - 3. Location(s) of the article(s) once the shipment was received until the damage was noted,
  - 4. Any mechanical or physical handling by the consignee subsequent to delivery by the carrier.
- (h) If a clear delivery receipt is available on the shipment, e.g., no damage or shortage is noted, the claimant must provide documentation showing that damage or loss occurred prior to delivery.

It should be noted that the NMFC is only applicable to "participating carriers and transportation companies to be used by them for their customers, as permitted by the applicable National Motor Freight Classification (NMFC) License Agreement". There some 358 "participating" interstate carriers, most of which are LTL carriers. Truckload carriers typically do NOT participate in the NMFC.

If the carrier is not a participant in the NMFC the "5-day" requirement for reporting concealed damage in NMFC Item 300135 does not apply. Unless the carrier has some other applicable rule in its bill of lading or rules tariff there is NO time limit for reporting concealed damage (but don't wait too long).

### **The One-Third Rule**

It is a common practice for some carriers to offer a one-third settlement on concealed damage claims where it is difficult to determine the cause of the damage or where the loss occurred. The theory is that it could equally be the fault of the shipper, carrier or consignee. There is no legal basis for this "one-third rule" and as discussed above, it is contrary to the federal regulations which require carriers to investigate all claims, and to make reasonable efforts to determine the cause and/or place of the loss.

## **Best Practices**

Regardless of the regulations, tariff or provisions in the NMFC, “time is of the essence” when it comes to concealed loss or damage. The more time that passes before discovery, reporting or requesting an inspection makes it more difficult to establish that the loss or damage existed at the time of delivery.

Documentation is critical. Many shippers use an “OS&D” report form that is filled out and is signed and dated at the time of delivery or discovery of loss or damage. Details are important and should describe thoroughly what was actually observed and what was done with the shipment. And, since everybody now has a smart phone, take plenty of pictures. If you make an in-house inspection, it should be signed and dated, with the name and qualifications of the inspector. If it is a joint inspection or carrier’s inspection, make sure you get a copy.

## **You Need to be a Detective**

All mystery novels and movies have a “Detective” and many times requires shippers and carriers need to put on their Deer Stalker hat and investigate “mysterious” or “concealed” damage or shortage. Here is my “**Sherlock Holmes List**”:

### 1. Condition and Quantity at Origin

#### A. Condition at Origin

Who packaged the shipment?

If the shipper did not package the shipment, e.g., imported goods, were there procedures to inspect or sample the contents of the packages before re-shipping the goods?

Was the packaging adequate for the normal rigors and transportation environment?

Is there a history of similarly packaged shipments that were delivered without damage?

Who loaded, blocked or braced the shipment?

Did the carrier’s driver have an opportunity to observe the condition of the packaging, blocking or bracing?

#### B. Quantity or count at Origin

Does the shipper have procedures and/or shipping records to verify what was put on the truck?

Was the shipment palletized or shrink-wrapped, i.e., can you visually tell how many cartons or packages are on a pallet?

If palletized or shrink-wrapped was there any distinctive kind, color or taping used?

Did the carrier’s driver have an opportunity to observe and count the number of packages or pallets?

#### C. Full truckload shipments

Was the shipment “SL&C” or a “dropped trailer” situation?

Was it sealed – by the shipper or by the carrier’s driver?

Was the BOL noted “SL&C”?

Was the seal number put on the BOL?

Were pictures taken before closing the doors?

Was the shipment later cross-docked or transferred to another trailer (check the trailer number)?

## 2. Condition and Quantity at Destination

### A. Condition at Destination

When, where and by whom was the first evidence of damage discovered?

Had the goods been moved from the place of delivery to some other location; if so, how and by whom?

Was there any damage to the packaging such as dents, crushing, wetness, odor; was it documented?

Where is the packaging, what happened to it?

What kind of damage was there to the contents – how do you think it may have happened?

Was the carrier notified and if so, how and by whom?

Was the carrier requested to make an inspection; did it do so and is there a report?

Did anyone else make an inspection – in house quality control, inspection agency?

### B. Quantity or Count at Destination

When, where and by whom was the first evidence of shortage discovered?

Did you check the number of cartons or pallets shown on the BOL?

Was there any evidence that the package had been tampered with: - opened, re-taped?

If the shipment was palletized and shrink-wrapped was there any evidence of re-stacking, re-wrapping?

### C. Full truckload shipments

Was the shipment “SL&C” or a “dropped trailer” delivery?

If the trailer was dropped, when and where was it delivered; what kind of security was there?

Was the trailer sealed, was there any evidence of tampering with the seal, door locks, hinges ?

Was the seal the same that had been affixed by the shipper; was the seal number the same as the one on the BOL?

Who removed or broke the seal at the time of delivery: the consignee or the driver?

Were pictures taken when the doors were first opened?

Was the trailer inspected for holes, foreign substances on the floor, etc.?

## The Bottom Line

Cargo Loss and Damage costs shippers, carriers (and intermediaries) millions of dollars every year.

Often the cause and responsibility is obvious – physical damage, accidents, fires, hijackings. However, many of the most disputed claims often involve “concealed” loss or damage where it is difficult to identify the cause or to place blame for the loss. Hopefully, this article will clarify the laws, regulations and the obligations of the parties so that such disputes can be properly and amicably resolved.