TRANSPORTATION & LOGISTICS COUNCIL, INC.

42ST ANNUAL CONFERENCE – ALBUQUERQUE, NEW MEXICO

GENERAL SESSION II: LAW OF THE LAND V. LAW OF THE JUNGLE

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CLAIMS and DAMAGES

1. Our Motor Carrier is telling us that accessorial charges are separate from freight charges and do not follow the terms on the face of the bill of lading. They say that accessorial charges (unlike shipping charges) are billable to the consignee regardless of whether shipped collect or prepaid.

The result is that even when the bill of lading says "prepaid" and we (the consignee) have paid the shipper, the accessorial charges are still our responsibility as the consignee.

The Motor Carrier is referencing their rules tariff as their basis for billing us, which we never agreed to. We do not have any agreement executed with Motor Carrier in which we accept the terms of their rules tariff; therefore, it would be my position that their rules wouldn't apply to us. It is my contention that Motor Carrier can't impose rules on another party that they don't have a contract with, that when the bill of lading is marked "prepaid"

2. As I understand it, the Carmack Amendment states "A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section". However, we have a carrier that states on their bill of lading that a claim must be made within 6 months and they recently denied a claim on this basis as well. Is this reduced time period allowed under the Carmack Amendment? My understanding is that they can make the time period more permissible but not more restrictive.

3. I am looking for a legal precedent that answers the question of receivers that do not allow drivers on their dock to verify unloading. Is this an acceptable practice? I have always understood the driver and the consignee in agreement as to the quantity and condition then sign the delivery receipt. When drivers are not permitted on the dock and must wait in a driver waiting room until the unloading is completed by the consignee, and the driver is later handed a delivery receipt with noted exceptions, is this to be construed as a legitimate delivery exception?

4. My company was the broker on two loads of tires that were stolen from a secured lot in Texas before they could be delivered to the consignee. Both of these loads were brokered to two different carriers. Truck, trailer, and cargo were all stolen. Our concern as the broker, is the cargo. Both carriers' insurance companies have been made aware of the claims. Our customer, a tire company, has presented claim demands for the retail value of the tires. I have spoken with an insurance representative for one of the carriers. He stated that the customer could only claim for their cost of the product, or their manufacturing cost, not the retail value. I believe that the customer or "owner of the goods" may be entitled to the retail value. How can I, as the broker, help to insure our customer is paid for the full amount of their claim?

Any input you could offer would be appreciated.

5. **If freight is lost in transit** and never gets delivered, does the carrier have the right to ask for the freight charges to be paid prior to the cargo claim being paid, and then reimbursed (as they do in a damage claim situation)? It seems the contract to pick up and deliver the shipment was breached by the carrier, since a proof of delivery does not exist, and they would not be entitled to collect freight charges. But I have been involved in cases where the carriers still will put these charges into collection and pressure them to be paid.

MEASURE OF DAMAGES

CORE CONCEPT: Under the Carmack Amendment, 49 U.S.C. § 11706 and 49 U.S.C. § 14706, (formerly 49 U.S.C. § 20(11)), rail carriers and motor carriers are liable for the **"actual loss or injury to the property".**

ISSUE(S): Shippers believe that the proper measure of damage is the invoice value, contract price or destination market value. Carriers argue (most of the time) that the proper measure of value should be the manufacturer's cost.

The courts generally hold that the injured party should be placed in the same position it would have been had the shipment been delivered intact. This means that the claimant (either the shipper or consignee) should receive the difference between (1) the fair market value of the goods if the goods were delivered undamaged and (2) the fair market value of the goods in their damaged or deteriorated condition.

In rejecting manufacturer's cost (or replacement cost) as a proper measure of damages, most courts rely upon the case of *Polaroid Corp v. Schuster's Express, Inc.*, 484 F.2d 349 (1st Cir. 1973), where the court held:

As to the proper measure of damages, courts have generally held that "full actual loss" under 49 U.S.C. 20(11) is equivalent to market value at destination. . .. There is some authority for limiting recovery to replacement cost where a manufacturer ships substituted goods to his buyer . . . . However, mere replacement costs deprive a manufacturer of expected profit which he is on the verge of earning and do not compensate him for what he "would have had if the contract (of delivery) had been performed. . . .," the test enunciated by the Supreme Court.

The court cases generally hold that the use of manufacturer's cost (or replacement cost) to measure damages is an ***exception to the general rule*** of invoice value or destination market value. If the carrier believes that the general rule should not be followed, the burden is on the carrier to prove why manufacturer's cost or some other measure of damage should be applied. See *Robert Burton Assoc., Inc. v. Preston Trucking Co., Inc.*, 149 F.3d 218, 221 (3rd Cir. 1998).

RELATED CASES:

See *Freight Claims in Plain English, 4th Edition,* Chapter Seven: Damages, pp. 93-128.
Eastman Kodak Co. v. Westway Motor Freight, Inc., 949 F.2d 317 (10th Cir. 1991);
Robert Burton Assoc., Inc. v. Preston Trucking Co., Inc., 149 F.3d 218 (3rd Cir.1998);
Custom Cartage, Inc. v. Motorola, Inc., 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).
Goodyear Tire & Rubber Co. v. Great Southwest Express Co., Inc., 2006 WL 587600, (N.D.Ga. 2006)

LIMITATION OF LIABILITY

1. I filed a damage claim with a less than truckload ("LTL") carrier in the amount of $3,127.75. The carrier is amending my claim per a Tariff 100 item that states: "entire liability to its customers for damages and shortages in any way related to movement of freight shall not exceed the greater of the shipping charges for the shipments involved or ten (10) percent of the debtor's total freight charges for the immediately preceding twelve (12) months." They then added the freight charges of 3 shipments, totaling $877.

Two of the shipments moved under one account and the 3rd under a separate account. They then took $877 - Total Paid on the other two claims which amended this claim to $359. Is this legal?

2. We are a local harbor trucking company that delivers sealed ocean containers. Upon delivery to this particular client because of the way their dock is situated, the container doors must be open as the driver backs into their unloading dock, which is on a very steep angle. The back of the container does have a type of fish netting to keep cartons from tumbling to the ground. In this particular instance this netting did not work and cartons fell to the ground and the customer is claiming damage. They said the driver made the truck "jerk" which caused the cartons to fall. We denied liability for the damage on the basis of the position of their dock and that they should have provided load locks to be placed at the door of the container to keep the cartons intact.

The import broker who was to be responsible for paying our trucking charge has debited the claim amount from our trucking invoices. My question is twofold. (1) Can they withhold trucking charges to pay for a freight claim even though we have denied liability? (2) Our delivery invoices also contain a "release valuation" clause which states that unless they declare a greater value, our liability for the merchandise is to be not exceeding $.50 per pound and our liability including negligence is limited to the sum of $50.00 per shipment.

How would we stand on this issue if we take the client to small claims court for withholding payment of freight charges?

3. We recently filed a loss claim with a large regional LTL carrier for a gearbox that was lost in transit. This unit was purchased new and when we started to install it, we found it to be defective and returned it for warranty evaluation at the manufacturer. The carrier lost the shipment before it reached the manufacturer. The unit was never used, the defect was found before it ever had the power put to it. The value of it was $1,197.00. The carrier paid us $65.00 and then claimed they over paid us and should have paid only $6.50 ($.10/lb) as it was now considered used. I have had a running battle with them for 3 months to no avail; they still claim it to be used. Are they right? Are there any regulations that determine when an item is considered used as opposed to new?

Limitation of Liability

CORE CONCEPT: Over the years, courts have developed a list of tests or requirements that must be met for a common carrier to effectively limit its liability.

ISSUE: Attempts by for-hire carriers to limit their liability for loss, damage or delay to goods have been the source of dispute and litigation since the beginnings of for-hire transportation. Each year, about one-third of the reported court decisions are in one way or another on the subject of limitations of liability.

There are four steps a carrier must take in order to limit its liability:

(1) maintain approved tariff rates with the ICC (No filed tariffs after Trucking Industry Regulatory Reform Act of 1994 ("TIRRA") and the ICC Termination Act of 1995 ("ICCTA"), see *Emerson Electric Supply Co. v. Estes Express Lines Corp.*, 2004 U.S. Dist. LEXIS 12965 (W.D. Pa. 2004);
(2) obtain the shipper's written declaration of his choice of liability;
(3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and
(4) issue a receipt or bill of lading prior to moving the shipment.

A key provision appearing on most bills of lading and often at the center of this controversy is reproduced below:

> **NOTE:** - (1) Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property as follows:
>
> "The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per_____."

In *Hollingsworth & Vose Co. v. A-P-A Transp. Corp.*, 158 F.3d 617 (1st Cir. 1998), the court stated it is enough that the tariff made both coverage's available, the bill of lading afforded the shipper a reasonable opportunity to choose between them and the shipper was a substantial commercial enterprise capable of understanding the agreements it signed. In our view, that is normally enough to give this shipper a "fair opportunity" to opt for more coverage in exchange for a higher rate.

Compare with *Toledo Ticket Co. v. Roadway Express, Inc.* (133 F.3d 439 (6th Cir. 1998), where the court refused to uphold a limitation of liability and held "[w]e cannot accept Roadway's argument that the effect of the quoted language from its bill of lading is that if a shipper fails to declare a released value for its goods, then Roadway enjoys the option of choosing to insure the goods at the lowest released value. In the first place, the language simply does not say as much. Furthermore, even if the obtuse language of the bill of lading could be construed as affording someone an option, surely Roadway has the option reversed. Under the statutory scheme, the carrier is liable for the full value of lost goods unless the shipper agrees to a lower value. The option to limit recovery for loss belongs to the shipper, not the carrier."

RELATED CASES:

OneBeacon Insurance v. HAAS Industries, __ F.3d __, 2011 WL 802048 (9th Cir March 9, 2011)

Hughes v. United Van Lines, Inc., 829 F.2d 1407 (7th Cir. 1987)

Carmana Designs, Ltd. v. North American Van Lines, Inc., 943 F.2d 316 (3rd Cir. 1991)

Tempel Steel Corp. v. Landstar Inway, Inc., 211 F.3d 1029 (7th Cir. 2000)

See also *Freight Claims in Plain English, 4th Edition,* CHAPTER EIGHT: LIMITATIONS OF LIABILITY, pp. 129-192.

BROKERS

1. We are a carrier and have an issue where the broker is refusing to pay open freight charges due to an insurance claim filed by their shipper/customer. The shipper loaded a reefer unit and set the temperature according to temperature stated on the bill of lading ("BOL"). When our driver tried to deliver the freight, the receiver noticed the temperature written on the BOL and automatically rejected the freight without attempting to inspect.

The receiver tested the temperature recorder and the recorder showed accurate temperatures. Driver took photo of the recording that the receiver did. The receiver rejected the freight and noted an 18 degree difference on the BOL, which would indicate the produce (strawberries) froze. The USDA

inspection was done on the temperature recording unit which shows an accurate temperature as indicated on the BOL instructions. The receiver still rejected the freight.

The broker requested driver to deliver the freight to another customer and broker would compensate carrier to re-deliver freight, which driver did. We submitted the invoice to our factoring company, but the broker is refusing to pay because his customer rejected the freight and filed a claim. The broker is asking us to file a claim with our insurance company. My question is, can the broker refuse to pay? If it does not pay, what are our options to get paid? Also, is it our responsibility to file a claim?

2. We are a freight broker and we broker loads directly to the intended carrier. At the time the shipment is tendered, we make sure we have an open file, or if it is a new carrier, we set a file up then. Recently we have had a few instances where our load is co-brokered again by the carrier without our knowledge or consent. In a couple of cases, the carrier did not have a broker's license, but just contract carrier authority. We have had several instances where we paid the carrier we tendered the load to, but this carrier brokered the load again and then did not pay the actual carrier that performed the move.
Of course the actual carrier is now looking to us and our customer for payment. We have declined to pay this carrier, as we should not have to pay the freight charges a second time. Neither will our customer pay the charges a second time. We want to be sure that if we become aware of a co-broker situation that we will not pay the party that co-brokered the load, but we will only pay the performing carrier. Can you give me an idea of something we can fax to the carrier at the time we tender the freight that will make it clear that if the load is co-brokered, we will contact the performing carrier and deal with them and void our rate confirmation with the company that co-brokered the load.

3. I am a freight broker located in North Jersey. I am having a problem with one of my shippers. I have been moving their freight for about the last two years. The problem is they are going to my carriers and asking them to sign on with them and are cutting me out of the picture. The shipper knows that all of my carriers have a contract with me and that there is a no "back solicitation" clause in it. The shipper is telling the carriers that because they are not using me anymore that they would not be breaking the law by signing on with them. Can they do this? What is my recourse?

My second issue is that the same shipper is withholding payment to me on loads owed for a total of well over $50,000.00. They are not paying me because of a load that was high jacked (state and local police, and the FBI were notified). This is creating serious difficulties because I owe this money to other carriers. I have a one-man operation and can't afford this hit. What can I do?

4. We are a 3rd party logistics company. Our customer submitted paperwork to us for a pick up. We turned this paperwork over to the carrier who picked it up and subsequently lost it. It came down to the fact that the paperwork contained bad information, which caused a lot of confusion, and the product ended up being lost. We have taken the following steps:

A. Our customer is trying to file a claim with us. We are denying the claim and telling them they need to go directly to the carrier. I cannot find a section that supports this action.

B. Our customer is withholding the payment of our invoice. We are stressing that they must pay the invoice because the freight moved per their paperwork and they can recoup the freight costs in their claim to the carrier.
Can you please provide further guidance?

A review of the recent court decisions illustrates situations in which broker liability for loss or damage has been discussed.

Phoenix Assur. Co. v. K-Mart Corp., 977 F.Supp. 319, 325-26 (D.N.J. 1997) involved a large cast of characters. The shipper, Gerson, had an arrangement with AFC Express to handle it outbound shipments. In October 1993, Gerson had a shipment of watches going from Shawnee Mission, KS to K-Mart in North Bergen, NJ. AFC issued a receipt for the shipment and subcontracted with Red Arrow Air Cargo Express to pick it up; Red Arrow split the goods into two shipments, giving 26 skids to J.S. Trucking (which arrived safely) and 17 skids to Mo-Ark Truck Services. Mo-Ark arranged with U.S. Fast Track, Inc. to transport the 17 skids and Fast Track engaged an owner-operator, James Sherling, who apparently absconded with the watches. Among the issues were whether Mo-Ark was a broker, and if so, whether it could be liable for the loss. The court stated: “In contrast to a ‘carrier’ or ‘freight forwarder’, a ‘broker’, if not negligent, is generally not liable for the value of goods lost in interstate commerce....”, citing dicta in Travelers Indemnity Co. v. Alliance Shippers, Inc., 654 F.Supp. 840, 842 (N.D.Cal. 1986). The court observed that Mo-Ark’s registration as a broker and Mo-Ark’s failure to register as a “carrier” were not dispositive of Mo-Ark’s true identity, and that there was a factual issue as to its relationships to Fast Track and Red Arrow. It should be noted that the Court referred the issue to the Secretary of Transportation for a ruling, but the DOT declined to decide the issue, and the case was ultimately settled.

5. I work in the claims division for a freight brokerage company and while working in this position I have noticed that broken seals are a confusing subject. If our company contracts a motor freight carrier to haul, for our customer, a shipment of flour, sugar or any other product of that nature that cannot be exposed to the elements and said load arrives to the delivery without the seal intact, does the consignee have the right to reject the load and file a claim for the entire shipment without testing it? Does a chain of custody play a role in determining this?

CAN A CARRIER COLLECT FREIGHT CHARGES FROM A SHIPPER WHEN THE SHIPPER HAS PAID THE BROKER FOR THE SHIPMENT?

CORE CONCEPT: Under the NMFC Uniform Bill of Lading both the consignor and consignee are liable to the carrier for payment of its charges. Where a Shipper has paid a Broker is it still responsible to a Carrier for freight charges for the shipment? The primary objection of shippers to the "double payment" is that it is "unfair".

ISSUE: When a consignor or consignee pays a transportation broker, who does not pay the carrier, can the consignor and/or the consignee be held liable for the carrier's freight charges?

Carriers contend that the shipper is liable because (1) under the bill of lading (i.e., the contract of carriage), the shipper, by default, remains primarily responsible for payment of freight charges; and/or (2) the broker acted as the "agent" of the shipper, so the shipper-principal remains liable if the broker defaults in paying the carrier.

Shippers contend that they should not have to pay for the same shipment twice because (1) the shipper contracted with the broker, whereas the broker contracted with the carrier to pay the carrier and the shipper was not a party to the broker's agreement with the carrier, and the payment arrangements among the shipper, broker and carrier constitutes a modification to the "default" provisions of the bill of lading; and (2) the carrier should be "estopped" from collecting from the shipper because the carrier did not invoice the shipper or seek payment from the shipper in a timely manner and the shipper made payments to the broker in reliance upon the shipper's understanding that the broker would pay the carrier.

RELATED CASES:

Olson Distributing Systems, Inc. v. Glasurit America, Inc., 850 F.2d 295 (6th Cir. 1988).
In re USA Motor Express, Inc., 2007 WL 3087295, 2007 Fed.Carr.Cas. ¶ 84,517 (ND Ala 2007).
Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co., 513 F.3d 949 (9th Cir. 2008);
See also: Augello, *Transportation, Logistics and the Law*, Second Edition, pp. 61-6

CONCEALED DAMAGE and SHIPPERS LOAD AND COUNT

1. I have run into a pattern from common carriers not inspecting damaged freight for a couple reasons. One reason is, it is under a certain amount that they have set policy not to inspect, and the other is not inspecting concealed damage. I have challenged nonpayment of these claims by contending that 49 CFR requires all claims to be fully investigated and by not inspecting the carrier has forfeited their rights to deny the claim by not fully investigating. If they do agree to pay anything, they always come back and offer 1/3 settlement and sometimes automatically send a check for this amount. I hold onto the check and challenge for the remaining balance of the claim.

Am I correct in what I am doing and for the right reasons?

2. I have a situation where we shipped 11 drums of material (5 drums on each of 2 pallets and 1 extra drum loose). The carrier's driver signed for "2 plts 11pcs". Upon delivery, the single drum was missing.

Customer signed for 2 pallets. A claim for the missing drum was filed and the carrier came back and said they do not entertain concealed damage claims. I told the carrier that this is not a concealed damage claim just missing freight. I also told the carrier (a contract carrier) that there are no provisions one way or the other in our contract about concealed damage claims. Our contract reads only about loss or damage claims and makes the carrier responsible for full invoice value.

My question is, can a carrier arbitrarily publish in their rules tariff that they do not entertain concealed damage claims and seeing our contract is silent on exactly mentioning concealed damage claims, are they covered under our language?

3. We picked up 16 totes of antifreeze in a sealed trailer out of Battle Creek, MI. Upon arrival at the consignee, the seal was broken. This was a shipper load and count and the consignee unloaded. On the bill of lading the consignee wrote "structural damage on 2 totes". Pictures were taken at a later date and sent with a claim form. The date on the pictures show 7-7-15. The freight was delivered on 8-7-15.

I believe since the shipper loaded and consignee unloaded that we have no liability. What is the proper procedure to deny this claim?

4. **In October of last year (2015), our client** reported a nine (9) case shortage on a shipment signed SLC at receiving on 10/20/15. Notice of shortage was made via email to ARPCO on 10/22. We have confirmed that the trailer was sealed at origin (Lineage Logistics in Sunnyvale) and have asked the receiving facility in Missouri City, TX to provide us with condition of the seal upon arrival at the receiving facility. We have been notified that their procedures do not require inspection of the seal, they are unable to provide proof that the seal was not intact or had been tampered with, and they have informed us that proof of a seal intact does not negate the validity of a shortage claim according to their policies and procedures. I understand that a shipment with a confirmed sealed (without proof of tampering) would negate a claim for shortage. Am I correct? Understand that we are trying to balance maintaining our relationship with the client, while protecting our Carrier and having them remit payment on the payables owed to us.

CONCEALED DAMAGE and SHIPPERS LOAD AND COUNT

CORE CONCEPT: Concealed damage claims are troublesome and often bitterly contested, despite the fact they traditionally account for only 3 to 5 % of all truck claims, according to surveys of major LTL carriers. The key to dealing with such claims is to keep in mind the fundamental principle that a claimant has the burden of proving two things about its shipment: (1) that it was in good order and condition at the time of delivery to the originating carrier and (2) it was in a damaged condition at the time of tender by the delivering carrier to the consignee.

ISSUE(S): (1) The extensive modern day use of containerization, palletization, shrink-wrapping or stretch-wrapping of shipments, etc. makes it impractical in many instances to inspect each and every carton or package tendered for delivery. As a result, a great number of these unitized shipments result in the filing of claims involving damage discovered after acceptance of the delivery from the delivering carrier. (2) Some consignees with financial clout (i.e., big box retailers) are requiring their vendors to designate all shipments as SL&C (even if the shipment is not a true SL&C), because the consignee will get a lower rate. (3) Some of these same types of consignees are forcing their vendors to accept chargebacks because of missed delivery times or for shortages that are reported days or weeks after delivery.

Under the Bill of Lading Act, 49 U.S.C. § 80113 (b), "a common carrier issuing a bill of lading is not liable for nonreceipt or misdescription of goods" when: (1) the goods are loaded by the shipper; (2) when the bill of lading bears a statement such as "said to contain" or "shipper's weight, load and count"; and (3) to the extent the carrier does not know whether any part of the goods were received or conform to the description.

RELATED CASES :
See *Freight Claims in Plain English, 4th Edition,* pp. 55-59 (Shipper's Load & Count); 247-253 (concealed damages and delay claims); 260- 261 (shortages and pilferage) for details.

In its decision in *Ex Parte No. 263*, the I.C.C. specifically rejected the various percentage formula rules. The Commission ruled that they violated the Carmack Amendment (49 U.S.C. § 11706 for rail and § 14706 for motor carriers) by attempting to limit carrier liability to less than full actual loss.

QUESTION: What is the claimant's burden of proof when concealed damage is discovered within 15 days and reported immediately?

ANSWER: Under NMFC Rule 300135, there is a substantial difference between a claimant's burden of proof when it reports the damage within 15 days of delivery and when it delays such a report until after 15 days. If reported within 15 days, there is no necessity to explain why a report was not given to the carrier immediately on delivery or to offer reasonable evidence that it occurred after delivery. If the report is made after 15 days, the claimant has the extra burden of proving that "the damage was not incurred by the consignee after delivery of the shipment by carrier."

Section 80113 of the Bill of Lading Act states:
A COMMON CARRIER ISSUING A BILL OF LADING IS NOT LIABLE UNDER SUBSECTION [a shortage] WHEN THE GOODS ARE LOADED BY THE SHIPPER … **is qualified by "contents or condition of contents of packages unknown", "said to contain", "shipper's weight, load, and count", or words of the same meaning; and** to the extent the carrier does not know whether any part of the goods were received or conform to the description.

There are factual questions when shortages arise, and the problem is exacerbated If the shipments are actually "SL&C" and the trailers are sealed at origin, the thing to remember is the claimant's basic burden of proof. The Claimant must prove with competent evidence (statement or affidavit from an employee having actual knowledge, shipping documents, loading tallies, etc.) what was actually loaded into the trailer at origin. Likewise, there must be competent proof that there was in fact a shortage at the time the trailer was delivered (and that it did not occur after delivery). The claimant (shipper or consignee) has a basic burden of proof: to establish by competent evidence the quantity and condition of what was tendered to the carrier at origin and what was actually delivered at destination. ***Ordinarily, if a carrier receives a sealed trailer at origin and delivers it with the seal intact at destination, and there is no evidence of tampering with the seal, locks, hinges, etc. there is a strong presumption that the shortage did not occur in transit. This obviously places a more difficult burden on the claimant.*** Therefore, on the basis of the information provided or the lack of information as to seal integrit***y*** I would deny the claim.