

TRANSPORTATION EXPO 2013

TRANSPORTATION CLUB OF MINNEAPOLIS & ST PAUL

MARCH 19, 2013

Shipping Contracts Update

OR

“What You Don’t Know Will Hurt You”

Ronald H. Usem Esq
763-545-2720
ron@usems.com

TRANSPORTATION EXPO 2013

**Ronald H. Usem Esq.
Transportation Attorney**

**Huffman, Usem, Crawford & Greenberg PA
5101 Olson Memorial Highway
Minneapolis, MN 55422
PH: 763-545-2720
ron@usems.com**

SHIPPING CONTRACT ESSENTIALS:

- 1. Basic Recitals, Assumptions and Expectations**
- 2. Express the Intent of the Parties**
- 3. Provide Guidance for Persons Interpreting the Contract**

Summary of Topics:

- 1. CONTRACTING ISSUES**
- 2. INSURANCE ISSUES**
- 3. DOUBLE PAYMENT ISSUES**
- 4. CARRIER SELECTION ISSUES**

Verbal vs. Written Contracts:

Verbal Contracts:

- May be enforceable.
- What are the terms?
- He said/ she said.....
- Higher Likelihood of Litigation

Written Contracts:

- Defines Rights and Obligations
- Allows Certainty in Complex Arrangements
- “Road Map” for operations

- Communications between the parties both verbal AND written become the contract.
- Actual performance of the parties “Course of Dealing”, becomes the “contract”.

Drafting Considerations:

- **Correct Names of the Parties**
- **Place of Origin and Place of Delivery.**
(Will it physically accommodate carriers equipment?)
- **Time Requirements. Realistic?**
- **After hours contacts/ instructions?**
- **Loading .Who is Responsible?**
- **Most common defense by carrier for cargo damage is “shipper fault”.**
- **Proof loading specifications were followed?**
- **What if carrier is early or late?**

Drafting Considerations:

Special Handling Requirements.

(fork lift case).....(goose neck machine case)

Characteristics of the Cargo

- **Fragile (Glass)**
- **Temperature Control**
- **Over Dimensional**
- **Tarping (Waterproof)**

Drafting Considerations:

SHIPPER CARRIER CONTRACTS (See Sample Wording attached)

- Prohibition against “ Double Brokering”
- Compliance with Applicable laws and regulations
- Responsibility for “ control” of carriers employees
- Will not have and “ unsatisfactory” safety rating
- Notice in change of operating authority
- INDEMNIFICATION CLAUSE
- Payment Terms Loss and damage process (Carmack Liability 49 USC14706)

Drafting Considerations:

SHIPPER CARRIER CONTRACTS (See Sample Wording attached)

- Insurance
- Notice in change of operating authority
- INDEMNIFICATION CLAUSE
- Payment Terms
- Loss and damage process (Carmack Liability 49 USC14706)

Insurance Considerations:

- **Cargo loss and damage Including Theft**
- **Valuation Issues. Major Source of Litigation**
- **Carrier Selection**
 - Personal Injury and Death Arising out of Carrier Accident.
 - “Vicarious Liability” based on :
“Negligent hiring”...or “Agency” / control theories.
 - Refrigeration /temperature controls/ seals/ salvage.

Insurance Considerations:

- **Do you know if the risks you want covered are, in fact, covered?**
- **Do you know if the conditions or exclusions in your policies eliminate the coverage you expect?**

DOUBLE BROKERING – IDENTITY THEFT

See Intransit Case: www.transportationatty.com)

Theft Issues

SHIPPER ACTIONS TO HELP REDUCE RISK:

- **ID Truck (sign on tractor) - must be same as the one hired.**
- **Verify phone #, address, MC number of carrier.**
- **Identify driver, name, check CDL for name and address - call carrier and confirm employment**
- **Video loading/ photo truck license #**
- **Photo copy CDL**
- **Tracking devices**
- **Insurance – verify with agent (not carrier)**
- **Does carrier have employee dishonesty insurance?**
- **Notify Police and FBI immediately if theft occurs**

“Double Payment” Risk

Scenario:

Shipper hires and pays carrier # 1. Carrier # 1 hires Carrier # 2 without informing Shipper and does not pay carrier # 2. Carrier # 2 delivers the freight and makes claim against Shipper for freight charges.

Question: Does Shipper have to pay twice?

Answer: Maybe.

US Supreme Court: If no other contract, bill of lading is the “transportation contract” between Shipper and Carrier.

“Double Payment” Risk

SHIPPER DEFENSES:

- 1. Do NOT pay any carrier without proof of delivery, (signed bill of lading) and carrier invoice**
- 2. Demand copies of all carrier documentation allegedly proving its claim.**
- 3. Bill of lading must have shippers name, consignees name, AND carriers name. Drivers name is NOT a carrier name without further proof.**
- 4. If bill of lading is marked “ non-recourse” carrier cannot collect from Shipper.**
- 5. If bill of lading is marked “ prepaid” carrier may not be able to collect from consignee.**

“Double Payment” Risk

6. In some states defense of “ Equitable Estoppel” may be enforced.

7. Shipper Bill of Lading: Reduce Risk:

- **A. “ WARNING” - IF THIS LOAD WAS NOT TENDERED TO YOU BY SHIPPER CALL 123-456-7891 IMMEDIATELY!”**
- **B. OR “YOU WAIVE RIGHT TO PAYMENT FOR ALL FREIGHT AND RELATED CHARGES”**
- **C. Sign or mark “ NON-RECOURSE “ section, or “ PREPAID SECTION”**

“Double Payment” Risk

- D. “In the event carrier is not authorized in writing to pick up freight from shipper, carrier waives all rights to seek payment of freight and any other related charges from shipper. Under no conditions shall shipper or consignee be liable for double payment of such charges.
- E. If there is a written contract between shipper and carrier, bill of lading can state: ‘This bill of lading shall function as a delivery receipt only and shall not allow carrier to collect any freight or related charges from shipper or consignee.’”

Carrier Selection Issues

- **Case Law since 2004**
- **Shippers may be liable for personal injury and death arising out of motor vehicle accidents involving a hired carrier, theories of vicarious liability, (negligent hiring) or “agency” where shipper “ controls” the carrier or its driver.**
- **Defenses: Adopt written carrier selection protocol and be able to prove it was followed!**
- **INSURE THE RISK!**

Carrier Selection Issues

- **In addition to exercise of other due diligence actions, the use of FMCSA CSA/ SMS scores is highly controversial.**
- **FMCSA purports to place the safety/ fitness determination, which is its legal obligation, on the public buying motor carrier services!**

Carrier Selection Issues

- **Three major studies have found the CSA scores to be statistically invalid for a variety of reasons.**
- **MAJOR PROBLEM FOR SHIPPERS WHO ADOPT THE USE OF SCORES TO HELP SELECT CARRIERS:**
 - Waiver of rights to challenge the scores in event of litigation.
 - Side effect...limitation on carrier capacity.

Carrier Selection Issues

Twelve Selection Suggestions:

1. **Verify operating authority with FMCSA**
2. **Verify Insurance with carriers insurance agent (not carrier)**
3. **Obtain insurance certificate from carriers insurance agent.**
- 4 **Verify filing with state secretary of state. (Good Standing)**
- 5 . **Name on all documents must be identical.**
- 6 . **Signed shipper carrier contract.**

Carrier Selection Issues

7. Length of time in business
8. References...check all
9. Membership in trade associations
10. Must not have unsatisfactory safety rating.
11. If conditional rating:
 - A. When was rating effective? (date)
 - B. What has been done about it?
 - C. Get copy of request for compliance audit.
12. CSA/SMS SCORES**USE AT YOUR OWN RISK!**

TRANSPORTATION EXPO 2013

END