

## Welcome to the latest edition of TT Talk, number 42 in the series

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### 1. Loss of original bills of lading and requests for issuance of replacement bills

This is the third part of Harry Lee's trilogy on bill of lading issues.

In the previous two editions, we have talked about situations where there has been a request to change bills of lading. Now we turn to the third and final one: where a negotiable bill of lading is said to have been lost before the shipment is ready for delivery. The shippers or alleged transferees of the original bill may urge the carriers to issue a duplicate set of bills of lading for the purpose of taking delivery. Since a negotiable bill of lading is a document of title, such requests must be handled with great care.

In the previous edition, in the item on "switching bills of lading", we highlighted the danger of having two sets of bills of lading in circulation for the same shipment: anybody who is holding a bill of lading acquired in good faith can claim delivery so if there are two bills you can have two people with apparently equally valid claims, demanding that you give them the cargo. Apart from that, if the shipper has not been paid for the cargo he retains the right to dispose of the cargo. As the carrier, you can never be 100% sure what has happened to the original set of bill(s) of lading: are they indeed lost, or has someone just overlooked the business of paying the seller? If you release cargo without firm evidence of the consignee's right to take delivery, you do so entirely at your peril.

It is sometimes said that an advertisement in the local press about the "loss" or "nullification" of the original bill is an adequate and simple remedy and once that has been done the carriers should be able to issue a replacement set without hesitation (or even release the goods without production of the "lost" bill of lading). It is dangerous in the extreme to rely on this belief. Firstly, as a matter of fact, such an advertisement can never protect an innocent buyer who never had the chance to read the advertisement, neither will it protect you against a claim from an unpaid sender. Secondly, as a matter of law, there is no exception to the simple working rule that delivery without production of bill of lading is at the carrier's own risk.

In *The Sormovskiy 3068* [1994] 2 Lloyd's Rep. 266, Mr Justice Clark understood the dilemma of carriers and indicated some support (seemingly!) for those who in certain circumstances have to consider delivery of goods without production of the original bill (such as when the original document is proved lost). It was said that an implied term to deliver without bills existed "in circumstances where it is proved to [the carrier's] reasonable satisfaction that the person seeking delivery...is entitled to possession and what has become of the bills of lading". However, in the famous English Court of Appeal case *Motis Exports v Dampskibsselskabet AF 1912* [2000] 1 Lloyd's Rep. 211, Mr Justice Rix highlighted that there is no such exception or excuse based on a reasonable explanation and that production of a bill is still a must in the absence of a contrary contractual agreement.

It has been set in stone at law that you are not bound to deliver to any person other than the lawful holders of the bill, or unless the court so orders. If it comes to the difficult position that the bill is absent and the importer is getting desperate, the recommended solution is to require a bank guarantee (or a company letter of undertaking countersigned by a bank, who thus agrees to "join in") in your favour. In 1984 and 1998 the International Group of P&I Clubs recommended certain forms of Letter of Indemnity (LOIs) to deal with various situations when bills of lading are unavailable for presentation.

You should consult your legal or insurance advisors and obtain the right indemnity before entertaining any request for delivery without presentation of bills of lading. A sound indemnity must include backing by a first class bank, insurance company or mutual association; adequate undertaking value (usually not less than 200% of the CIF value of goods); coverage of all claims and costs in association with issuing a duplicate bill; is valid at least as long as the minimum period for legal actions under contract in the country of jurisdiction (not just the time-bar period stated in the conditions of carriage), and a reliable law and jurisdiction clause to enforce the indemnity. It is also a sensible additional precaution to check with the shipper to make sure he has been paid and has no objection to the cargo being released.

Alternatively, cargo interests may apply for a court order. But this takes more time and cost (including the warehousing); and they will still have to demonstrate their entitlement to take delivery.

Finally, the old advice is still valid advice: if there is a request for delivery but the original bill of lading is unavailable for whatever reason, never release the shipment without the most rigorous checks. Make sure all your staff are aware of this rule, and appoint someone senior as the only person in your organisation entitled to approve requests for irregular releases. Do not listen to threats from the consignee: the law (and the Club) will support you if you refuse to deliver until a valid bill of lading has been surrendered.

## **2. Do you really know what your customer wants?**

Postgraduate research by Steven Bell, as part of his MSc in logistics and supply chain management at the Heriot-Watt University in Edinburgh, UK, has highlighted several gaps between the services freight forwarders think their customers want, and what the customers are actually looking for. As part of his research, Steven chose twenty-three different aspects of transport operators' services and asked operators and their clients to rank them in order of importance.

While there was general agreement about the ranking of many aspects of operators' services, including speed of service and reliability of delivery times, the study highlights major differences in perception about the use of modern technology. Shippers ranked operators' willingness to develop internet-based services as No. 2 in their wish-list; forwarders put it down at No. 12. While, in interviews, many forwarders agreed that the provision of internet-based services was important, it is clear that they are still some way from meeting their clients' requirements.

Similarly, shippers thought tracking and tracing services were fairly important, putting them in at No. 8, while forwarders put them down at No. 14. One customer reported during an interview that an effective tracking and tracing system had been his primary requirement when selecting a new forwarder.

Forwarders, on the other hand, thought that their company's willingness to negotiate rate changes and their company's reputation would be significant factors for a customer to consider when choosing a transport operator, ranking them at Nos. 2 and 5. Customers did not agree: they put these factors at a lowly 15 and 14 respectively. Forwarders were concentrating on their image, thinking that this would attract more business, but customers were more interested in past performance.

From an insurance point of view, there was general agreement on the relative importance of an operator's record of loss and damage to goods in transit: the customers put this at No. 9, the operators at No. 10.

Steven's work can be seen on his website at [http://mysite.freemove.com/stevens\\_world/Clyde\\_00\\_home.htm](http://mysite.freemove.com/stevens_world/Clyde_00_home.htm)

### **3. The Texas Airfreight Stowaway**

Back in the late 1980s, the Club was faced with one of its stranger claims when a woman was discovered inside a consignment of personal effects in a container. She had arranged to be packed along with her effects, and a supply of food, in a case and dispatched to South Africa, where she was discovered when transport workers heard her calling out. She was hospitalized for several weeks and was then repatriated on government orders, leaving the Club's member with a substantial bill for her care. Although the Club's policy at the time made no provision for such a claim (basically, we never thought anybody would be that stupid), it was met under the directors' discretion clause, which is, of course, one of the special features of the Club's cover.

That claim was regarded as very much a one-off, but now news comes from the United States of someone else with the same idea. Last September Charles McKinley was living in New York but very much wanted to visit his folks back home in Dallas, Texas. He could not afford a plane ticket but hit on the idea of going home by airfreight. With the help of a friend, McKinley had himself packed in a box, which was then collected by a parcel freight company. He was trucked to JFK, and then to Newark, New Jersey where he was loaded on a plane via Buffalo, NY to Fort Wayne, Indiana. There he was transferred to another flight to Dallas-Fort Worth and eventually, two days after his journey started, Mr. McKinley was delivered to his parents' house. That was when things started to go wrong. Rather than wait until the box was safely on the ground, he started to move around. The driver, alarmed at the unexpected noises from inside the box, investigated and "saw a pair of eyes peering through one of the slits in the box". McKinley then kicked out one of the side panels, got out of the box and went into the house. Police were called; McKinley was arrested and charged with violations of federal aviation law.

Two weeks ago, McKinley was found guilty by a federal court in Fort Worth. He was sentenced to four months' house arrest, a year's probation and a fine of USD 1500.00. The airfare he had tried to save was USD 320.00.

What is worrying is the ease with which Mr. McKinley appears to have evaded the security measures supposedly in place in US airports. Freight forwarders in Europe, who have long been used to rules requiring a 24-hour delay on cargo from unknown shippers, compulsory X-raying of consignments and other mandatory checks are shaking their heads as to how it was possible for this human cargo to slip through the net, particularly at a time when there were increased concerns about possible terrorist attacks using all-cargo aircraft.

### **4. Conclusion**

We hope that you will have found the above items interesting. If you would like to have further information on any of them, or have any comments you would like to make, then e-mail the Editor at [tt.talk@ttclub.com](mailto:tt.talk@ttclub.com). We look forward to hearing from you.

Andrew Trasler  
Deputy Editor  
TMS (UK) Ltd London

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