

Welcome to the latest edition of TT Talk, number 41 in the series

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1. Chassis concerns reach Capitol Hill

Harry Higham of our office in Jersey City, NJ, reports on the latest developments in Washington DC:

Recently there have been some interesting developments in the legislative sector as well as discussions in the intermodal transportation industry relating to maintenance and repair of over-the-road chassis.

On December 1, 2003, the Federal Motor Carrier Safety Administration of the Department of Transportation (Docket No. FMCSA-98-3656, Federal Register/Vol. 68, No. 250, Wednesday, December 31, 2003) withdrew its advance notice of proposed rule making to do with inspection, repair and maintenance of intermodal chassis, first issued on February 17, 1999. It did so, in particular, on the basis of its finding that it lacks sufficient, comprehensive data concerning chassis maintenance and chassis issues. It concluded that any present attempts to make such rules would not resolve the disputes between chassis providers and motor carriers.

Two bills concerning responsibility for inspection, repair and maintenance are now before the 108th Congress (Senate Bill, S.1776 and House Bill H.R. 2863). Both establish compliance and record keeping requirements for the industry, as well as setting out an inspection regime. They also speak to indemnity provisions in contracts between providers and motor carriers without necessarily condemning or barring them. It is not yet clear whether either or both bills will receive determinative consideration in the present session.

In advance of a recent meeting of the Intermodal Interchange Executive Committee (IIEC), a committee of the Intermodal Association of North America, meetings were held between TT staff and members' risk and operational managers concerned with these matters. The Ocean Carriers' Equipment Managers Association (OCEMA), an industry association of chassis providers, also took part. Discussions centred around the indemnity and hold-harmless provisions of the intermodal industry standard equipment interchange agreement, the Uniform Intermodal Interchange Agreement (UIIA). The IIEC also considered a proposal from the chassis providers for an agreed programme of systematic maintenance of intermodal chassis.

Undoubtedly, the question will continue to retain legislative interest at federal level, and no doubt there will be many hours of negotiations.

The TT Club continues to monitor these developments closely and will remain in close contact with Members.

2. Trading conditions: the importance of incorporation

Members and readers of TT Talk will be aware of the constant nagging from the Club about the need to incorporate standard trading conditions. The Club's cover is based on STCs being incorporated in all agreements member companies make with their clients. The reasons for our concern are clearly demonstrated by our friend, Peter Jones in the latest posting on his website <http://www.forwarderlaw.com> - good and proven incorporation of a forwarder's STCs made a difference of a cool USD 647,950.00 in its liability.

A printing press worth USD 648,000.00 was damaged in transit between Germany and the United States. Having paid a claim to the owners, cargo insurers sued the freight forwarder to recover this amount. The forwarder could, however, point to the fact that he operated under the terms of the National Customs Brokers and Forwarders' Association of America (NCBFAA) and that he had handled at least twenty-five previous shipments for the machine's owners. On each occasion the forwarder had issued documents referring to the conditions. The conditions limited the forwarder's liability to an amount of USD 50.00.

The court held that the conditions met the criteria laid down in previous decisions and said that, although there was evidence that the forwarder had been negligent, it could still rely on the USD 50.00 limitation.

Further details are available on the Forwarderlaw website at <http://www.forwarderlaw.com>

3. Bills of lading: stay switched on!

This is the second part of Harry Lee's trilogy on the problems that can arise with bills of lading. In TT Talk No. 40 we covered the first situation in which amendments to the first set of transport document is requested by the cargo interests. In this item, the Club offers its recommendation on another common situation - "switch" bills of lading.

"Switching" bills of lading is a procedure for transport operators to handle with great care. Here is just one story, which replicates itself from time to time in the transport field, aided by careless operators!

A forwarding company in Hong Kong was handling the movement of a consignment from Shanghai to Los Angeles. The cargo had been sold by manufacturers in China to a trader - the forwarder's customer - in Hong Kong, who had sold it on to his clients in the United States.

The trader asked for the original bill to be replaced with another one showing himself as the shipper and the ultimate buyers in the US as the consignees. Due to miscommunication between two of the forwarder's departments, the second ("switch") bill was issued without first collecting the original bill of lading - which was still in the hands of the suppliers in the PRC. The shipment duly arrived in the US where the buyers, having paid the trader, had obtained the switch bill, which they presented in exchange for the cargo. Unfortunately although the traders had been paid they somehow did not get round to paying their suppliers in China. The consequence was that the unpaid Chinese seller, still in possession of the first set of originals, could successfully make a claim against the forwarder. The forwarder could not limit his liability and had to pay the Chinese shipper the full amount of his loss.

Occasions on which Switching Takes Place:

Switching bills of lading is usually requested by traders who wish to conceal the identity of the suppliers and the end-users from each other. The reasons are normally quite legitimate, but Members must be on their guard when dealing with such requests. The main feature of switching is that it is done without the cargo being handed over at the same time: as the example above shows, switching bills often takes place well away from the route the cargo is taking.

As a Priority - Perfect Switch!

It is of utmost importance that all the originals of the first bill of lading are collected and cancelled before the replacement set is produced and issued. That is the carrier's only guarantee that the middleman is truly the owner of the goods and has rights to their further disposal. The forwarder-carrier must ensure that only ONE set of his bills of lading for the same consignment is circulation at any one time: otherwise he may face competing claims from two consignees, each holding an apparently valid bill of lading. Depending on the circumstances, if you allow two sets of bills of lading to be circulating for the same shipment you may be in breach of your insurance cover with the Club.

The master bill of lading

The actual carrier's (master) bill of lading MUST be addressed to your agent at destination, who must also be kept informed of the changes to the underlying bills. Otherwise there is a risk that the cargo falls into the wrong hands. There must also be a link between the company on whose behalf the second bill was issued (the NVOC) and the shipper or consignee shown in the master bill.

Bills of Lading: Take care with amendments:

Almost invariably, switching bills of lading involves issuing a second document with information that differs from the first. Although the process could be regarded as a bilateral alteration of the terms and conditions of the contract of carriage, various difficulties may arise, according to the types of information changed. It is advisable that members always secure a letter of indemnity from the company making the request, holding them harmless for any adverse consequence(s).

Certain information should NEVER be changed. Firstly, the date and place of shipment as stated in the original bill of lading. Changing this information may work to the detriment of an endorsee who has relied on it in his contract of sale. For instance, if time is the essence of the contract for the buyers of the goods, they may suffer a big loss by being misled about the original date of shipment.

Secondly, customers should not under any circumstances be allowed to change the number of packages or the weight shown in the original bill of lading.

Thirdly, if the original bill of lading is claused, the switch bill must carry identically worded clauses.

Finally, any special instructions of the shippers such as temperature requirements cannot be changed or omitted.

Other information may be changed without too great a problem provided the new information is true and correct. This includes: the names of the shipper, consignee or notify party; the shipper's description of the goods; the name of the ship (if necessary); the place and date of issue (if not the same as those of shipment); the freight and the port of discharge. You should obtain written confirmation from your client, setting out in detail his requirements for the new bill of lading. If significant changes are requested to the cargo details, you should consider getting both evidence to support the changes and an indemnity from the client to protect you in the event of a dispute with the consignee.

Jurisdiction rules

Difficulties may arise when the switch bill is issued in a jurisdiction different from the original one: as a result the Hague or Hague-Visby regime may apply to one bill but not to the other. Would the Hague/Hague-Visby rules be displaced by the switching? Up to now this point has not been decided by any authoritative judgment. Nevertheless, it is submitted that in the least, the Hague-Visby regime should still govern because under Article 1 of the Rules, they would apply from the time of loading, drawing an analogy with the case of a transshipment; alternatively the Rules, once being applicable by force of law, may not be readily discarded by a private agreement between two or more of the parties in the contract.

Therefore, if your standard form of transport document does not contain an international convention "clause paramount", or it does not contain certain important liability exemptions, you must be careful in accepting instructions to switch bills of lading, and should consult your Club office or liability insurers. If you do not, you may find yourself subject to unexpectedly onerous liability regime or you may prejudice your insurance cover.

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. We look forward to hearing from you.

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TT Talk is a free electronic newsletter published as occasion demands, by the TT Club, International House, 26 Creechurch Lane, London EC3A 5BA, United Kingdom.

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