

Welcome to the latest edition of TT Talk, number 48 in the series

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1. Advance Manifest System, and "Said to Contain" Clauses

There has been much confusion caused by one aspect of the introduction of the Advance Manifest System (AMS) as part of the US government's drive to improve security of maritime trade. The AMS regulations ban, among other things, the use of the words "said to contain" and this has been widely interpreted to mean that those words cannot appear on a bill of lading.

The Club has been concerned about this interpretation, as it would rob carriers of an important protection when defending claims for cargo shortages. Normally an ocean carrier is responsible for any shortages in cargo - based on the quantity originally stated in the bill of lading - discovered at destination. A consignee is entitled to rely on the statements in the bill of lading and the carrier cannot deny their truth. In the modern world of containers, carriers cannot check every single part of every single load, so they have to take the shipper's word for it that the cargo is as stated; by using the phrase "said to contain" they are putting the consignee on notice that no warranty is given that the statement is absolutely correct. In the event of a dispute, the shipper has to demonstrate that he did, in fact, load the complete cargo as described.

It seemed to the Club that the apparent prohibition of the STC clausing under the new US regulations would leave members exposed to claims for shortages that were not their fault. We have therefore made enquiries of the US customs authorities and have now received the assurance that the prohibition on the use of "said to contain" applies only to the manifests. These are the documents drawn up by the ship operators listing all the cargo on board and while they are naturally based on the information contained in the individual bills of lading, they are documents used for administrative purposes only.

The US Customs & Border Protection service (CBP) has told the Club that the rules do not control the language on bills of lading, but only the type of reporting that has to be made to it. Providing that there is an adequate description of the goods, the words "said to contain" may still be used in bills of lading.

More information is available on the CBP's website at <http://www.CBP.gov>. Go to the Import section, look for "24 hour rule" and "Frequently Asked Questions".

2. Quiz of the week

What do bras, fizzy drinks and instant noodles have in common? For an answer, see item 4.

3. Don't let shipping lines railroad your recovery prospects

Peter Zambito, partner in Dougherty, Ryan, Giuffra, Zambito and Hession of New York, writes about the problems of claiming against US railroad operators.

Where an intermodal move involved both sea and rail transport, the rail carriers are normally retained by the ocean carrier. There is often no direct contractual link between the shipping line's customer (whether a cargo-owner or an NVO) and the railroad operator, so that if an accident occurs during the rail transport the shipper has to rely on the ocean carrier to give timely and proper notice to the rail carrier of the claim. The ocean carrier is, of course, also the one to hear earliest about the accident: it may be some time before the news seeps through to the shipper or consignee.

It often happens in the USA that when legal proceedings are started by cargo owners (or their underwriters) following a rail accident to an intermodal shipment, the ocean carrier is more often than not left off the list of defendants. This means that an NVO may be left to defend the claim by himself, particularly if he cannot drag the main carrier into the proceedings. There are many reasons why an ocean carrier can escape US proceedings: it may, for instance, be domiciled in another jurisdiction or have a valid jurisdiction clause in its bill of lading conditions. If timely notice of a claim has not been given to the rail carrier, in accordance with the railway's own conditions of carriage, the NVO will be truly left out in the cold with nowhere to turn to for effective recourse.

A recent case in the US highlights the problem: a TT Club member acting as an NVO made timely written claim on the rail carrier and shortly afterwards received a confirming letter indicating that the notice did not conform to the governing statute. While still within the nine month time for notice, the member unfortunately did nothing further and allowed the nine month period to lapse. The member was validly sued by cargo interests within COGSA's one year period and eventually had to settle the case without recourse against the ocean carrier or rail carrier.

Accordingly, we recommend that if you are unfortunate enough to have cargo damaged in a rail accident in the USA., you give timely and proper written notice to the rail carrier and do not rely upon the ocean carrier to do so. US law (Title 49, Section 1005.2 (a) and (b) of the Code of Federal Regulations) and the regulations promulgated by the Surface Transportation Board, sets out the following requirements for a claim notice:

A claim for loss, damage, injury, or delay to cargo, may not be voluntarily paid by a carrier unless the claim is filed in writing. This provision sets forth the mandatory requirement for filing a proper written claim with a carrier.

Minimum filing requirements.

A written or electronic communication (when agreed to by the carrier and shipper or receiver involved) from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and:

- (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property
- (2) asserting liability for alleged loss, damage, injury, or delay, and
- (3) making claim for the payment of a specified or determinable amount of money,

shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage; provided, however, that where claims are electronically handled, procedures are established to ensure reasonable carrier access to supporting documents.

Such notice must be sent to the railway operator within nine months of the accident. If the railroad then writes back saying that your notice does not conform to the requirements of US law, please consult your usual TT claims handler as a matter of urgency, so that the complaint can be re-drafted to meet legal requirements.

4. Quiz ends with a bang

Still stumped by the question in section 2? This is not something from Trivial Pursuits, but relates to a deadly serious incident. All these items were loaded in a container which exploded a couple of weeks ago in the port of Los Angeles. They were, you will be glad to hear, not the immediate cause of the explosion, but they were damaged or destroyed as a result.

The incident demonstrated clearly the long chain of consequences that can result from a failure properly to load and declare hazardous materials.

The explosion blew the doors off the container and scattered burning cargo over some 20 - 30 meters. The fire department was quickly on the scene but, because the contents had been described as "FAK" (freight all kinds) , they had no idea of what might have caused the explosion and how dangerous it was. The firefighters could therefore not approach too closely and had to monitor developments from a safe

distance. In the current political situation, an explosion in a major maritime terminal gave others great cause for concern. The port police were of course there and the city police sent their bomb squad; the US coastguard maritime safety organisation, the customs investigation department, the department for homeland security and a number of other official agencies all sent teams to the terminal. When it was discovered that the ship's stowage plan envisaged the container being loaded immediately underneath one containing declared hazmat, the law-enforcement agencies became very worried. They thought that there might have been a conspiracy to load the containers in this way, and to use the lower one as a fuse to set the upper one alight, in order to create a really big explosion.

Eventually the shipper was able to fax through details of the load and, having inspected the wrecked and still burning container from a safe distance, the fire chief authorised his crews to extinguish the blaze from close quarters. Besides the items already mentioned, the cargo, described as FAK ("Freight All Kinds") included a pick-up truck, some wet-cell batteries some gas canisters and a number of other items of hazardous cargo. In spite of the fact that it contained hazardous material, it appears that the container bore no placards as prescribed by the IMDG and no declaration had been furnished by the shipper.

Eventually, a couple of hours after the initial explosion, the fire was put out and the examination of the debris could begin. However the terminal's troubles were not over: part of the terminal remained sealed off by the police so containers could not be moved; and although mercifully no-one had been injured, the longshoremen's trade union decided that it was too dangerous for its members to continue working and called them out on strike.

While detailed forensic analysis is still awaited, it is thought that the explosion occurred when a spark from the batteries or something in the vehicle's electrical system ignited fumes either from the gas cylinders or the fuel tank. Whatever the cause, the consolidator has a good deal of explaining to do to his clients, and to the authorities.

The incident confirms that even in the most sophisticated societies there is still an alarming lack of concern among shippers about the hazards their cargoes might present to transport workers, seafarers, ships, vehicles and innocent bystanders. It underlines the message that the Club has been putting out for some time, on the need for better education of the exporting community and a greater awareness of the requirements of the IMDG. This incident happened on land, where the consequences could, to some extent, be contained. In spite of this, the consequential costs will be quite high, and will have to be borne by the consolidator. Had the container exploded after it had been loaded as planned on board ship, the results would have been too horrendous to contemplate.

5. Better hazmat handling procedures

While on the topic of hazardous goods handling, we would like to thank readers who have responded to the request in TT Talk No 46 for ideas on improving safety. We will return to this in a future edition.

6. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information on 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.