BY HENRY E. SEATON

Safety and Technology in the Foodstuff Supply Chain

> THIS PRACTICE OF 'REJECT IT, CRUSH IT, AND DUMP IT' IS SIMPLY UNFAIR TO BROKERS AND CARRIERS, IS WASTEFUL, HARMFUL TO THE ENVIROMENT AND WASTES ENERGY TO PRODUCE THE PRODUCT AND DESTROY IT...

Previously, I have expressed my concern about bureaucratic overreach in the name of highway safety and the effect of publication of SMS methodology on shipper and broker liability. Since all industry constituents – shippers, brokers and carriers alike – now call for the redaction of SMS methodology, I will not beat a dead horse on that topic this month. Instead, I want to discuss industry concerns about food safety, the pending new FDA rules and the possible use of technology to alleviate the wasteful yet ever increasing shipper practice of "reject it, crush it, and dump it" where foodstuffs are involved.

Although without a doubt, the U.S. has the safest and most laudable food safety record of any nation, fear of terrorist interdiction and a few expensive food product recalls resulting from contamination at processing plants have alarmed the industry and federal regulators alike.

Unfortunately, the response of many wholesale grocery houses and food manufacturers alike has been an unquestionable "better safe than sorry" approach to simply reject, crush and dump any food product which is delivered without a seal intact with no concern for evidence of tampering or food adulteration.

To be sure, we have not been able to control theft of goods in transit or to keep organized crime and petty thieves alike from driving off with loaded trailers from truck stops or simply picking seals in an effort to discover commodities that can be fenced. In 2006, I wrote a short article entitled "Sour Pickles Not Spoiled" condemning the destruction of a truckload of pickles in hermetically sealed jars, stored in boxes and shrink-wrapped to pallets, which were destroyed simply because seal integrity was not maintained. In the last nine years, the situation has only gotten worse with major shippers insisting on sole discretion to simply trash broker sealed shipments of even shelf ready product as diverse as flour and soda pop where temperature damage, shelf life, or signs of adulteration are not even an issue.

The result of this practice is shipper cram-down on brokers and the carriers who serve them of cargo claims which far exceed the statutory liability of carriers under the Carmack Amendment and any insurable risk a motor carrier's underwriter is willing to assume.

This practice of "reject it, crush it, and dump it" is simply unfair to brokers and carriers, is wasteful, harmful to the environment and wastes energy to produce the product and then destroy it, further damaging the carbon footprint. Whether this practice is "sustainable" does not seem to be the issue. Many think the Safe Transportation of Food Act requires destruction of all broken seal shipments because "the shipment may have been contaminated." This argument would seem fallacious on its face since in the absence of evidence of internal tampering with a product in transit, the same argument could be used to require destruction of any foodstuff item left on open display in a grocery store anywhere in the country.

In this context, of heightened concern to shippers, brokers, carriers and warehousemen alike, are the new FDA rules which will engulf the transportation of perishable foodstuffs in a mountain of red tape and recordkeeping, setting rigid parameters for temperature control and presumed adulteration.

Although the major problem with contaminated perishable products appears to be with imports over which U.S. authorities can exercise little control until the product hits our borders, the new regulations will present new recordkeeping challenges for all members of the supply chain. Yet the new rules do not affect shelf ready product nor will they validate the notion that a broken seal alone creates a presumption that a shipment must be rejected, crushed and dumped.

All of the concern about food safety, excessive regulations, and the "reject it, crush it, and dump it" theory aside, in my view what is needed is a practical way to employ greater technology and cooperation within the industry to make intelligent decisions about the fitness of product for human consumption before it is summarily destroyed.

There are precious few recognized experts who can certify goods as fit for human consumption when disputes over broken seals arise. There is a need, I believe, for a recognized arbitration or mediation program involving a joint inspection conducted by a neutral third party expert which would allow the determination of a reasonable mitigation value of allegedly damaged cargo and the affixing of the measure of actual damage which the motor carrier's cargo insurer would accept and pay.

> "ALTHOUGH THE MAJOR PROBLEM WITH CONTAMINATED PERISHABLE PRODUCTS APPEARS TO BE WITH IMPORTS... THE NEW REGULATIONS WILL PRESENT NEW RECORDKEEPING CHALLENGES..."

If a shipper has quality control standards or wishes to direct the destruction of goods, any loss it sustains over the damage to the goods, as determined by the third party expert, will be borne by its property insurer with waiver of subrogation.

In this context, technology has at least three roles to play:

(1) to provide greater electronic surveillance of cargo in trailers in transit;

(2) to develop better seals and lock technology including fingerprint ID for access to cargo; and

(3) to apply technology and the law of thermodynamics to better test and measure temperature variance and possible adulteration in transit which affects the quality of perishable commodities. We have the technology to measure the ambient temperature of trailers in transit and the core temperature on a skid basis as well.

Whether the issue is highway safety or food safety, more regulations and "better" contracts are not the answer. Neither carriers nor cargo can be assumed to be unsafe and treated as "damaged goods" without reliable evidence.

Henry E. Seaton, Esq. I Seaton & Husk, LP
2240 Gallows Road I Vienna, VA 22182
Tel: 703-573-0700 I Fax: 703-573-9786
heseaton@aol.com I transportationlaw.net