

~~50~~ 61 *Good Reasons Not to Waive Federal Transportation Law and Bill of Lading Terms by Contract*

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Delta Nu Alpha Webinar



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61 Good Reasons Not to Waive Federal Transportation Law and Bill of Lading Terms

- I. Introduction
- II. What is Waiver? 49 U.S.C. §14101(b)
- III. What gets thrown out by a blanket waiver?
 - A. Carmack (49 U.S.C. §14706)**
 - 1. National uniformity and consistency of statute
 - 2. Predictability v. state law variance
 - 3. Uniform treatment of special and consequential damage issue
 - 4. Removal to federal court, 28 U.S.C. §1337
 - 5. Venue flexibility for deciding and situs of loss, 49 U.S.C. §14705(a)
 - 6. Forum non-conviens, right to transfer to convenient venue, 28 U.S.C. §1391
 - 7. Burden of proof for negligence transferred to shipper
 - 8. Document presumption of good order and case law lost.

9. Consignee duty to accept shipment unless practically worthless and to mitigate damage loss
10. State law liability standard inconsistent with cargo insurance coverage
11. Joint line apportionment-49 USC 14706
12. Liability imposed on connecting line carriers, issuance of bill of lading not required-49 USC 14706(1)
13. Full actual value
14. Released evaluation
15. Preemption trumps state law causes of action

B. Written Claims Requirements

16. Regulations establish standards of what constitutes a claim-370.3(c)
17. Minimum claims requirements established-370.3(b)
18. Adjustment and response procedures-deadlines, free astray certifications-370.5 and 370.7(c)
19. Administrative Ruling 65 and 128-payment of freight charges/dispute resolution of claims vs. offset

C. Uniform bill of lading or standard bill of lading provisions waived

20. Bill of lading is contract of carriage/waiver results in shipping documents becoming simple receipt for goods-VICS bill contains no terms and conditions
21. Loss of release rate notice and inadvertence clause, opportunity to declare higher rate

22. Loss of C.O.D. provision to require collection upon delivery
23. Special instruction block for special service terms
24. Identity and definition of the party-who is the carrier in possession and control
25. Identify payor of charges/is shipment prepaid or collect or third party
26. Accurate description of commodity including hazmat certificate

Back Side Terms and Conditions Omitted from Contract

27. Reasonable dispatch defined
28. Act of God exception
29. Act of public enemy
30. Authority of law
31. Inherent vice
32. Act or omission of shipper

Common Law Exceptions
Trumped by Waiver

33. 9 month rule for filing claims, statement in writing required-49 U.S.C. 14706(e)(1)(a)
34. 2 years after denial to file suit limitation, stated in writing-49 U.S.C. 14706(e)(1)
35. Carrier lien for freight charges confirmed-49 U.S.C. 80109, 49 U.S.C. 13707
36. Provision for warehouse statement of status upon wrongful rejection
37. Salvage provisions/non-perishable
38. Salvage provisions/perishable
39. Deduction of transportation charges from salvage after sale
40. No liability for items of extraordinary value
41. Hazmat protocol/shipper duty to identify
42. Payment of freight charges/liability of consignor and consignee (UBOL Section 7)

43. Instrumentalities of Transportation-Define the Parties

- Consignor-49 USC 80101(2)
- Consignee-49 USC 80101(1)
- Broker-49 USC 13102(2), 49 CFR 371
- Motor Carrier-13102(14)
- Not defined – 3PL, logistics company or “transportation service provider”

44. Pitfalls to broker of waiving statutory definition

- Loses statutory definition as arranger, easily becomes “provider” entering the liability loop and chain of custody vs. the mischief of “service provider” status

45. Shipper pitfalls

- Loses standard as “member of shipping public” and public utility analysis – prime contractor in supply chain

- 46. Broker recordkeeping and production of payment records waived-49 CFR 371.3
- 47. Misrepresentation provision separating broker from carrier-49 CFR 371.7
- 48. Anti-rebate prohibitions waived-49 CFR 371.9
- 49. Broker responsible for discharging shipper's payment duties-371.10
- 50. Prohibition against broker commingling of funds and requirements of segregation waived-371.11
- 51. Basis for "constructive trust" under statutes and regulations waived

Miscellaneous statutes

- 52. Off-Bill discounts, truth-in-billing-49 USC 13708
- 53. Overcharge, undercharge and duplicate payment regulations waived-49 CFR 378

54. Statutory time limits for identifying overcharges and undercharges-180 day rule, 49 USC 13710
55. Broker's bond registration and bond requirements waived
56. Shipper load and count provisions which result, presumption on shortage and damage claim waived-49 USC 80113
57. Possessory lien and duty to deliver-49 USC 80109-49 USC 13707
58. Self-help provision, 49 USC 14704
59. Anti-lumping statute, 49 USC 14109
60. Payment liability, 49 USC 13706, 49 USC 13707, Credit Regulation at 49 CFR 377
61. Statute of limitation for collecting freight charges

What is a Waiver?

Answer:

Pursuant to 49 U.S.C. 14101(b):

“If the shipper and carrier, in writing, expressly waive any or all rights and remedies ... for transportation covered by contract, the [services] provided under the contract shall not be subject to the waived rights and remedies and may not be subsequently challenged on the grounds that it violates the waived rights and remedies.”

What are the consequences of waiving federal “rights and remedies” and standard bill of lading terms and conditions?

Answer:

It takes 10 to 20 pages of fine print to address the issues you just excluded and in the details the carrier often loses.



What Important Items Get Trumped By Overly Broad Waiver?

Answer:

- (1) Carmack Amendment for cargo claims
- (2) Statutory definitions and duties and obligations
- (3) Uniformity and Predictability



What is Lost by Allowing Waiver of Carmack?

1. Consistency

The complete waiver position leaves contract interpretation up to the differing laws of the 50 different states and state law judges who may have little familiarity with federal transportation matters and who are simply not as sophisticated as the Federal Courts.

2. Predictability

There is a plethora of federal Carmack precedent/state law because of Carmack and preemption is sparse

3. Uniformity

As will be shown in this presentation, the Federal Statutes, regulations and bill of lading terms provide a balanced and uniform system for determining the duties and obligations of the parties, regardless of the forum or the location of the cause of action involved. Carmack is a contract remedy. If left to state “tort” law, measure of damages is not confineable.

4. Removal

Federal Court jurisdiction lost:

(a) 28 U.S. §1337

(b) Removal is important tool

(i) Better judges

(ii) Well settled precedent

5. Venue Flexibility

49 U.S.C. §14705(d) allows suit at origin, destination or over-route (where the loss occurred or where witnesses are located)

6. Federal Forum Non-conveniens

Federal forum non-conveniens permits transfer if more convenient federal court vs. home provisions (e.g. California for loss in New Jersey)

7. Burden of Proof

- Under Carmack, carrier negligence is not an issue
- Waive Carmack burden of proof under state law becomes an issue

8. Document Presumption of Good Order

- Ease of determining liability/document presumption – effect of clear delivery receipt

9. *Duty to Mitigate Loss*

- “Practically worthless” test versus “sole discretion standard”

“PRACTICALLY WORTHLESS” PRODUCT

Your duty as the consignor and consignee to mitigate damages and to accept the product unless it is practically worthless is well established by case law. See *Chicago & North Western R. Co. v. Union Packing Co.*, 514 F. 2d 30 (8th Cir. 1975); *F.J. McCarty Company v. Southern Pacific Co.*, 428 F. 2d 690 (9th Cir. 1970); *Sunset Motor Lines, Inc. v. Lu-Tex Packing Co.*, 256 F. 2d 495 (5th Cir. 1958).

10. Insurance Coverage Problem When Carmack is Waived

- Shipper's sole discretion to mitigate damages is not insurable
- Cargo insurer left with no salvage or adjustment
- Insurers deny claims/institute declaratory judgments

11-12. Joint Line Liability/ Apportionment and BOL Requirement

- Origin or destination carrier may be sued and must then seek contribution from carrier at fault
- Issuing of bill of lading not necessary
- Carrier defined in bill of lading as “any party in possession under contract.”

13. "Full Actual Value" Limitation Lost

- Case and precedents
- Fair market value
- Warehouse-to-warehouse vs. destination market value
- Waiver results in “meeting of minds and state law issues”

14. Released Evaluation/Declared Value Protocol Lost

- Release Rates
 - Parties can agree to limit carrier liability in return for reduced rates through bill of lading notice and carrier's rules tariffs which are provided for. See 49 U.S.C. §14706(c)
- Notice
- Rates to value options
- Election/inadvertence provision
- Established precedent

15. Preemption

- When claims rules are waived, what is lost?
 - Necessary to trump state law causes including tort with punitive and consequential
 - Necessary to trump broadly worded indemnity
- Air freight / Indianapolis example
- Restating Carmack standard after waiving statute
- Will not get you back to Federal Court or preempt state law

Schneider

- Air waybill limits liability to \$100,000.
- Forwarder pays \$692,000 claim and turns to Schneider under shipper/carrier contract for “indemnity”
- No contract limitation, no Carmack or bill of lading limitation
- Schneider has to pay \$692,000

Written Claim Requirement §370

16. What constitutes a claim?

- Bad order report, exception report is not enough - §370.3(c)

17. Establishes minimum requirements:

- Identify shipment - §370.3(b)(1)
- Claim for sum certain - §370.3(b)(3)
- Requires documentation of amount - §370.3(c)

18. Establishes adjusted procedures

- Deadline for response - §370.5
- Free astray shortage certification - §370.7(c)
- Processing of salvage - §370.11

19. *Contracts often waive traditional separation of freight charges vs. freight claims*

- Freight charges are due, owing and uncontested
- Claims may be contested as to liability or amount
- Administrative Rulings 65 and 128 (challenged but not abandoned)
- Waiver opens door to unilateral offset

Contrast

- Pay freight charges and adjust claims with indemnity + offset = no mitigation, no insurance proceeds and cash flow interruption

Offset leads to insurance dispute

- Carrier's insurer deprived of investigation and participation in salvage
- Policies do not pay full "earned freight" amount
- Carrier intimidated to sue shipper

20. *Bill of Lading as a Contract of Carriage is Waived*

- The bill of lading contract terms and conditions bind all the parties

Texas Pacific Railroad v. Leatherwood, 250 U.S. 470 (1919)

"The bill of lading is the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers."

Bill of Lading (cont.)

- Basic bill of lading terms traditionally track rail bill proscribed by statute but truck transport requires simple receipt only (49 CFR §373)
- Uniform bill of lading or standard truckload bill of lading is often not incorporated in shipper and broker contracts and VICS bill of lading conspicuously has no back side

STANDARD TRUCKLOAD BILL OF LADING CONTRACT TERMS AND CONDITIONS

§ 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

27-32. Common Law Exception →

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, or resulting from a defect or vice in the property.

27. Reasonable Dispatch →

§ 2. (a) No carrier is bound to transport said property in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination.

(b) In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

33. 9 Month Rule 14706(e)(1)(a) →

§ 3. (a) As a condition precedent to recovery, claims must be filed in writing with a participating carrier within nine months after delivery of the property or in the case of failure to make delivery within 9 months after a reasonable time for delivery has elapsed.

34. 2 years/1 day Statute of Limitation 14706(e)(1) →

(b) Suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

36. Warehouse on Rejection/Lien →

§ 4. (a) Property not accepted by the consignee, after notice of the arrival of the property at destination has been duly sent or given, may be kept subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be stored in a public or licensed warehouse at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

37. Salvage Non-Perishable →

(b) Where nonperishable property is refused at destination by the consignee or where the consignee fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell same at public auction to the highest bidder, at such place as may be designated by the carrier.

38. Salvage Perishable →

(c) Where perishable property which has been transported to destination and the consignee or party entitled to receive it has failed to receive it promptly, the carrier may, in its discretion, to prevent deterioration, sell the same to the best advantage at private or public sale.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

← 39. Deduction of Charges from Salvage Proceeds

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

§ 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

← 40. Extraordinary Item Exclusion

§ 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

← 41. Hazmat Obligation-Shipper

§ 7. (a) The consignor or consignee shall pay the freight and all other lawful charges accruing on said property. The consignor shall be liable for the freight and all other lawful charges unless the consignor stipulates, by signature, in the place provided for that purpose on the face of the bill of lading the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment.

← 42. Consignor/Consignee Liability for Freight Charges Confirmed

(b) Consignee becomes liable for freight charges upon receipt unless the consignee is an agent only and has no beneficial title in said property; and prior to delivery has notified the delivering carrier of these facts.

(c) Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

← 35. Carrier Lien Preserved

§ 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

§ 9. (a) All surface transportation provided under this bill shall be subject to federal statute and common law otherwise applicable to regulate interstate shipments. U.S. statutes and regulations shall apply unless otherwise waived by signed written agreement.

(b) If all or any part of said property is carried by water, and the loss is carried by water and loss, damage, or injury to said property occurs while it is in the custody of the carrier by water, the liability of such carrier shall be determined by the applicable bill of lading and under laws and regulations applicable to transportation by water.

27. Reasonable Dispatch Defined

- "Unless arranged or agreed upon, in writing, prior to shipment, carrier is not bound to transport a shipment by a particular schedule or in time for a particular market, but is responsible to transport with reasonable dispatch. In case of physical necessity, carrier may forward a shipment via another carrier."

For further discussion see Schwartz v. Atlas Van Lines, 976 P. 2d 145 (Wash. App. 1999); 99 Fed. Carr. Cases at ¶84092. The U.S. Supreme Court in Chesapeake and Ohio R.R. v. Martin, 283 U.S. 209 (1931) considered proper construction of the phrase "reasonable time for delivery" and concluded that "the phrase should be construed to mean that the time "to transport and make delivery of a shipment in the ordinary course of business, in light of the circumstances and conditions surrounding the transaction."

28-32. Common Law Exceptions Defined vs. Contractual "Force Majeure Clauses"

- Act of God
- Public enemy/seal relevance
- Authority of law
- Inherent vice
- Act or omission of shipper

33. Nine Month Rule

- Must be incorporated in tariff or bill of lading
- 49 U.S.C. 14706(e)(1) [A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section]
- If not included, state law governs
 - No notice and up to five years
 - Washington State case

34. Statute of Limitations

- 49 U.S.C. 14706(e)(1)
- Again, must be enforced by tariff or bill of lading, standard truckload bill of lading, and uniform bill of lading – have 2 years after denied.
 - (E.g. – Washington State bankruptcy case – 5 years late)

35-36. Carrier's Lien on Rejected Freight

- Liability converted to warehouseman
- Storage in public warehouse subject to lien



37-38. Salvage Sales Terms

- **Non-perishable**
 - Can be sold at public auction after 15 days notice to consignee
- **Perishable**
 - Carrier has discretion to sell at best advantage

39. Deductions from Salvage Proceeds

- Carrier may deduct from proceeds (contract terms denying salvage rights and requiring free storage)

40. No Liability for Items of Extraordinary Value

- Allows carrier to exclude high value shipments from liability by tariff
 - (e.g. When used machinery is actually a missile launcher)



41. Shipper and Agent Risk for Disclosing Explosive or Dangerous Goods

- Hazmat protocols are important and bills of lading serve often as only “contractual” document binding actual consigner of goods
- FAA, TSA issues are unresolved/major issues in air freight industry



Transportation
Security
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42. Payment of Charges/Consignor

- **Section 7 – Consignor primarily liable unless executed**

See Hawkspere Shipping Company, Ltd. v. Intamex, S.A., 330 F.3d 225 (4th Cir. 2003); National Shipping Co. Of Saudi Arabia v. Omni Lines, 106 F.3d 1544 (11th Cir. 1997); Strachan Shipping Co. v. Dresser Industries, Inc., 701 F.2d 483 (5th Cir. 1983); Contship Container Lines, Inc. v. Howard Industries, Inc., 309 F.3d 910 (6th Cir. 2002); Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co., 513 F.3d 949 (9th Cir. 2008)

43. Waiver destroys important definitions of instrumentality of transportation leading to confusion over roles and duties of brokers, carriers and freight forwarders



Important Definitions – Instrumentalities of Transportation

- Consignor – 49 U.S.C. 80101(2)
- Consignee – 49 U.S.C. 80101(1)
- Broker – 49 U.S.C. 13102(2), 49 C.F.R. 371
- Motor Carrier – 49 U.S.C. 13102(14)

Not defined: 3PL, logistics company, or
“transportation service provider”

44. *The pitfalls of waiving broker regulations for the broker:*

- Broker quickly becomes construed as provider rather than arranger
- Broker is mistakenly named on bills of lading as carrier
- The door is opened for broker liability for cargo claims
- The door is opened for “contractor/subcontractor” *respondeat superior*, negligent entrustment, master/servant, etc., state law claims in accident suits naming broker
- Broker asked to assume contractual duties beyond statutory requirements. See Schramm v. Foster, 2004 U.S. Dist. Lexis 16875 (D.Md. August 23, 2004); See “Vicarious Liability Travels Up the Supply Chain” (DNA Webinar, February 2008).

Property Brokers

- Like an insurance agent, real estate broker or stock broker, a property broker, under the statute, brings together a willing buyer and seller, owes both a duty of due diligence, but accepts the ultimate contractual obligations of neither.

Contrast to Carrier Definition

- A carrier is defined as a “provider” of transportation and has independent and non-delegable safety duties. See 49 C.F.R. 13102(14).
- Federal safety regulations impose duties exclusively on motor carriers, not upon brokers or shippers. See 49 C.F.R. 385-394.

45. Shipper Pitfalls

- Shipper loses shipping public defense through own interjection of state law and state law principles.
- State law construction analysis obscures the “shipper liability for negligent hiring ends with the retention of a carrier the FMCSA certifies as safe” defense.
- Shipper’s 25 page contract becomes cannon fodder for plaintiff’s bar.

Shipper and carrier lose important protections against broker malfeasance

- 46. Recordkeeping and production of payment records to shippers and carriers-§371.3
- 47. Misrepresentation - Broker must not directly or indirectly represent itself as a carrier-§371.7
- 48. No rebating-§371.9
- 49. Broker responsible for transmitting payments-§371.10
- 50. Accounting requirements – no commingling-§371.11

51. Constructive Trust Argument

- Broker regulations establish enforceable duties/constructive trust
- Major credit and collection issue is the role of the broker
- Why should any carrier allow waiver?
- ACI, Blue Thunder, Computrex, et al.

52. Off Bill Discounts

- 49 U.S.C. 13708 requires invoices to show discounts and credits
- Protects shippers from agent malfeasance, and consignees from “prepay and add” fraud

53. Billing Disputes

- 49 U.S.C. 13710 imposes 180 day rule for overcharge and undercharge
- Waiver vitiates important time limit (e.g. \$6 million dispute – post audit traps)

54. Overcharge, Undercharge and Duplicate Payments

- 49 U.S.C. 13710
- 49 C.F.R. 378
- Establishes procedures for resolution without litigation or offset
- The \$5 million state law issue and the post-audit contract!!

55. Broker Bonds - Registration

- Eliminates important verification tool
- *De minimis* bond but important resources

56. Bill of Lading Act

- Non-liability for non-receipt, misdescription, and improper loading
- Shipper load and count – 49 U.S.C. 80113
- Shifts count and upset in transit
presumption of major importance
because of HOS and spotted trailer, seal
issues/TSA and “One Fine Pickle”

57. Duty to Deliver and Possessory Lien

- 49 U.S.C. 80109
- The legal basis for on-hand notice, possessory lien and deduction of warehousing and transportation for salvage
- 49 USC 13707

58. Self-Help Statute

- 49 U.S.C. 14704
- Grants federal cause of action for carrier and broker violations

59. Anti-Lumping Statute

- 49 U.S.C. 14109
- Prevents lumber shakedowns

60. Payment Liability

- 49 U.S.C. 13706
 - Consignee liable for freight unless gives notice of agency only
- 49 U.S.C. 13707
 - Allows for payment and delivery unless otherwise agreed

61. Statute of Limitations for Collection of Freight Charges

- 49 U.S.C. 14705(a)
- Freight charge – 18 months after charges accrue
- Settled the “filed rate” battles of the '80s
- Compare to 5 or 10 year state statutes of limitation

End - Q&A

