

# NAFC 2007 Executive Education Forum

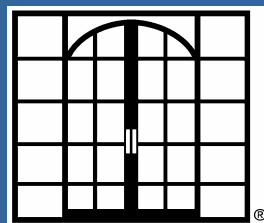
Denver, Colorado

## Cargo Claim & Freight Charge Issues and Canadian Owner-Operator Issues – Workers' Comp

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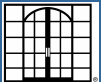
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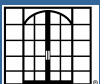
SCOPELITIS, GARVIN, LIGHT & HANSON

# Cargo Claim & Freight Charge Issues



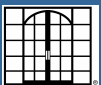
# The Basic Framework

- Liability of motor carrier or freight forwarder is generally governed by the Carmack Amendment (“Carmack”).
  - Under Carmack, Motor Carrier or Freight Forwarder is liable for actual loss or injury to the property transported.
    - Special damages, punitive damages, and attorney fees are not generally available unless... the carrier is on notice of (and agrees to) the potential for specific damages resulting from loss/delay.
    - Moderate delays are not typically actionable claims. (Only requirement is reasonable dispatch.)



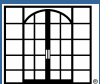
# Who Does Claimant Pursue?

- Shipper need not seek out the carrier that caused the damage (if there is more than one carrier) but rather can file a claim with any of the carriers engaged in transporting the damaged freight.
- Claim can generally be made by anyone with an interest in the shipment (consignor, consignee or assignee thereof).



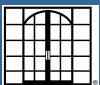
# ***Prima Facie Case Under Carmack***

- Goods were tendered to the carrier in good condition;
- Goods were not delivered, were delivered short, or damaged; and
- The claimant was damaged.



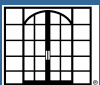
# Carrier's Defenses Under Carmack

- After the claimant establishes its prima facie case under Carmack, the burden shifts to the carrier to show that the sole cause of the loss was one of the five recognized common law defenses:
  - Intervention of public authority;
  - Act of war/public enemy;
  - Act of God;
  - Act of the shipper;
  - Inherent vice of the goods.
- The carrier must also show that it was free of negligence in the performance of the transportation.



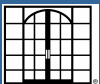
# Claim Requirements & The Carrier's Claims Process

- Claim must be filed with the carrier or freight forwarder in writing, and typically within 9 months of the date of delivery.
  - Carmack Amendment allows motor carriers to provide for the time limits for filing a cargo claim, but precludes motor carriers from setting a claim deadline shorter than 9 months from the date of delivery.
  - Date of delivery is determined from the intent of the parties and can be a question of law or fact depending on the circumstances.



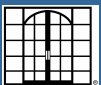
# The Claim Must Also:

- Identify the shipment sufficiently to enable the carrier to conduct an investigation, and
- Make a claim for payment for a specified or determinable amount of money.



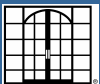
# Once a claim is filed with a carrier, the carrier must:

- Acknowledge the claim within 30 days;
- Assign a claim number;
- Give a status report every 60 days (with any explanation of reasons for delay in resolving the claim);
- See 49 CFR §370.9 for claim requirements.



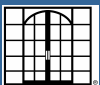
# Broker Liability (or lack thereof):

- Brokers are typically not liable under Carmack, but may be contractually obligated to pay claims, or to submit claims on injured party's behalf.



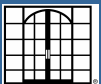
# Filing Suit – When To File?

- The Carmack Amendment provides that the time frame for filing suit can not be shorter than two years.
- The time begins to run from the date the carrier gives the claimant written notice that all or a portion of the claim is rejected or disallowed.
  - Correspondence between the claimant and the carrier may toll the time limit.
  - A 2nd Circuit case has held that a carrier that requested additional information and advised the claimant that the claim was “still open” could not claim the claim was rejected and the statute of limitations had run.
  - An offer in compromise or a letter from the motor carrier’s insurer may operate as a partial disallowance of the claim. See 49 U.S.C. § 14706(e)(2).



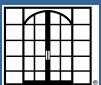
# Duty to Mitigate Damages

- Typical duty to mitigate damages applies in the cargo claim context.
- Mitigation typically comes into play in the form of salvage of the damaged cargo.
- Salvage procedures are set forth in 49 CFR §370.11.



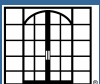
# Carmack Preemption

- Generally speaking, the Carmack Amendment preempts state law claims.
- Courts in different circuits interpret this differently, some reading this preemption broader than others.
- Claimants often try to assert state law claims for torts, claiming such claims are not related to the transportation of freight, but based on other independent actions engaged in by the motor carrier.



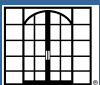
# Contracting Around Carmack

- ICCTA allows parties to opt out of Carmack liability. See 49 USC §14101(b).
- Statute states that agreement must be:
  - “in writing”
  - “expressly waive any or all rights and remedies under this part”
- Courts analyze the specific contractual language to determine the extent of any waiver of rights, and often reach what seem to be conflicting results.
- Some courts have ignored the requirement that this waiver be in writing.
- Others have found the statute permitting waiver only applies to contract carriers, not common carriers.



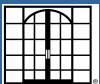
# Carmack Is Not Applicable When...

- Exempt Commodities, e.g.:
  - Seafood (unprocessed)
  - Fresh produce
  - Livestock
- Shipment is from an adjacent foreign country on a through-bill.
  - However, Carmack does apply if a separate domestic BOL is issued or if the shipment is an export from the US to Canada or Mexico.
  - At least one court has held that domestic rail transportation -after ocean carriage from Japan - is subject to Carmack, not COGSA.
- The claim is against a Broker
  - Breach of Contract
  - Negligence

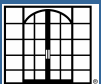


# Cargo insurance

- Motor common carriers and freight forwarders are required to have minimum cargo coverage of \$5,000 per vehicle and \$10,000 per occurrence. No cargo insurance requirement for contract carriers. (FMCSA BMC-34.)
- The cargo insurance declarations page does not tell the whole story because it does not disclose policy exclusions.
- Exclusions can swallow the policy
  - Unattended vehicle (theft effectively excluded);
  - Declared vehicle requirement (no coverage if not listed);
  - Unattached trailer;
  - Commodity exclusion (only covers cardboard, plastic and groceries);
  - Must show failure of component (reefer policy).
  - Exempt products may not be covered (grain, fish, fruit, fresh vegetables, etc.).

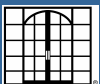


# Canadian Owner-Operator Issues Workers' Compensation



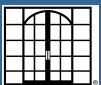
# Owner Operator - One Truck

- **MANITOBA, NEW BRUNSWICK, NEWFOUNDLAND & LABRADOR, AND QUEBEC**
  - The O/O must have workers' compensation insurance from the province WCBs or Commission, paid for by the motor carrier.
  - If the O/O works for only the motor carrier, the O/O will be deemed a worker (the Canadian term for employee is worker and the Canadian term for independent contractor is either contractor or independent worker) of the motor carrier.



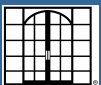
# Owner Operator - One Truck

- **SASKATCHEWAN**
  - The O/O is deemed a worker of the motor carrier because he operates heavy equipment (if he contracts exclusively with the motor carrier).
  - However, if the O/O obtains his own account at the WCB and pays premiums, the motor carrier will not be assessed premiums for the O/O.



# Owner Operator - One Truck

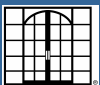
- **ALBERTA, BRITISH COLUMBIA, NORTHWEST TERRITORIES & NUNAVAT, NOVA SCOTIA, PRINCE EDWARD ISLAND**
  - The O/O may be considered an independent worker, but only if he has obtained his own WCB account.
  - The O/O must have workers' compensation coverage from the provincial WCBs. Clearance certificates or letters of coverage must be obtained by the motor carrier.



# Owner Operator - One Truck

- **ONTARIO AND YUKON**

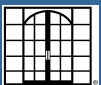
- The O/O may be considered an independent worker if the Board has deemed the O/O independent.
- If deemed independent, the O/O does not have to obtain workers' compensation coverage from the province WCB.
- The motor carrier must obtain a clearance certificate or other certification from WCB to verify O/O's independent worker status.
- In Ontario, certification must be verified every 60 days or the motor carrier risks expiration of the certification and subsequent determination of worker status of the O/O by the Ontario WCB.



# Fleet Owner – More Than One Truck

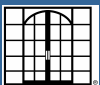
- **ALBERTA**

- The motor carrier can require the O/O to obtain its own WCB account and pay for its own coverage, including the coverage of its drivers.
- This is true whether the O/O operates as a corporation or is unincorporated.
- The motor carrier is ultimately liable, however, if the O/O has any outstanding assessments or unpaid accounts.
- To protect itself, the motor carrier should obtain a certificate from the WCB to ensure the O/O is in good standing and has a valid account.



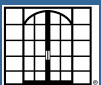
# Fleet Owner – More Than One Truck

- **BRITISH COLUMBIA, MANITOBA, NORTHWEST TERRITORIES & NUNAVUT, ONTARIO, PRINCE EDWARD ISLAND, QUEBEC, YUKON**
  - The motor carrier can require O/O to register with WCB and establish its own account.
  - If the WCB allows establishment of O/O's own account, then the motor carrier does not have to pay premiums to its account.
  - The motor carrier is ultimately responsible, however, and must ensure O/O's account remains valid by obtaining a clearance letter or certificate of clearance from the WCB.
  - Note that Quebec will not issue clearance certificates to any industry other than construction. To confirm that the O/O is still in good standing in Quebec, the motor carrier must obtain an authorization and forward it to the WCB.



# Fleet Owner – More Than One Truck

- **NEWFOUNDLAND & LABRADOR**
  - O/Os are considered subcontractors (for which the motor carrier owes WC coverage) or contractors (a person or entity who must provide their own WC coverage).
  - The motor carrier must provide the Workers' Compensation Commission with a list of all contractors/subcontractors on the form A6-Employer's Contractors Listing.
  - The Commission then makes a determination as to whether a O/O must open his own WC Commission account or must be included under the motor carrier's account.



# Fleet Owner – More Than One Truck

- **NEW BRUNSWICK**

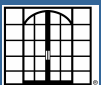
- O/Os with more than three (3) drivers are not considered workers and therefore the O/O essentially becomes a contractor who is required to register with the WCB.
- The motor carrier is not required to pay for the O/O's WC coverage in this situation.
- If, however, the O/O has less than three (3) drivers, then the O/O is still considered a subcontractor, and thus the motor carrier's "worker," and the motor carrier must pay for coverage.



# Fleet Owner – More Than One Truck

- **NOVA SCOTIA**

- If the motor carrier leases a O/O with less than 3 employees, then the motor carrier must pay for WC coverage, unless each of the employees has been deemed an independent worker (unlikely).
- O/Os with 3 or more employees must be registered with the WCB under their own accounts, and then the O/O will be responsible for coverage.
- The motor carrier must obtain a clearance letter from the WCB for O/Os with 3 or more employees to protect itself.



# Fleet Owner – More Than One Truck

- **SASKATCHEWAN**

- O/Os are heavy equipment operators and are considered the motor carrier's workers even though the drivers are paid by the O/O.
- However, if the O/O obtains his own WCB account, the motor carrier will not be assessed premiums.

