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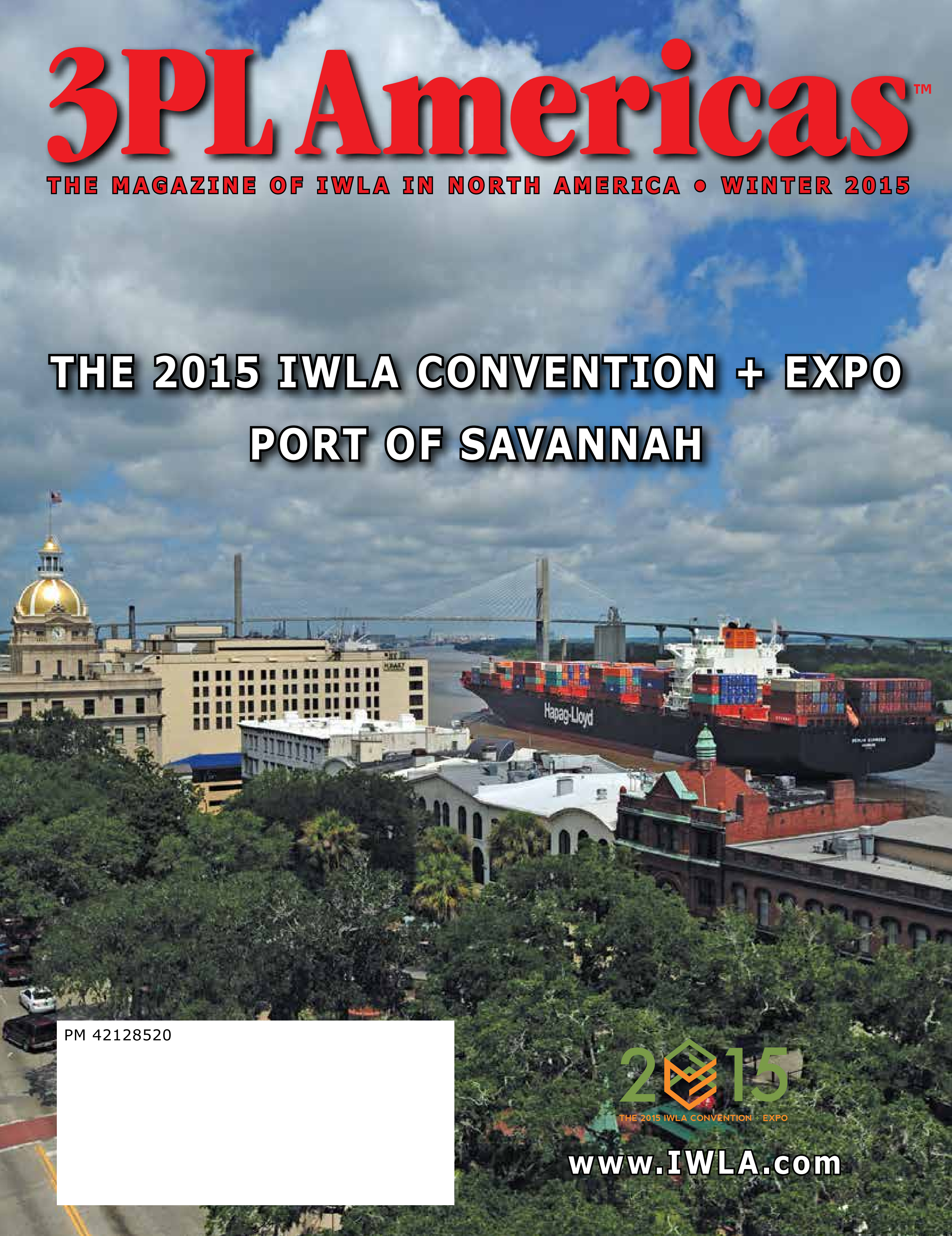

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"What's the Big Deal if I Sign This Contract?"

By Marc Blubaugh

Too often, motor carriers neglect to consider the ramifications of entering a transportation contract without a limitation of liability.

MOTOR CARRIERS are regularly presented with contracts by their prospective or existing customers in a "take it or leave it" fashion. The motor carrier quickly weighs in its mind the benefit of the very real and immediate business opportunity (i.e., top-line revenue and a possible long-term customer relationship) against what appear to be distant, theoretical risks (e.g., freight loss or damage, shipment delay, a personal injury or non-payment) that may never come to pass. Oftentimes, without a clear understanding of the contract, or without even reading the contract at all, the motor carrier simply signs and moves forward. Not until a high-dollar cargo claim or a catastrophic personal injury arises does the motor carrier begin reflecting on the significance of the piece of paper that it has signed. Of course, by then, it is too late.

Motor carriers who are in transportation for the long term should take a more-thoughtful approach, particularly when transporting high-value freight or doing business with sophisticated shippers whose contracts may strip the motor carrier of many traditional rights. At the very least, any motor carrier should understand and, where appropriate, walk away from the following contractual provisions:

No Limitation of Liability

In the ordinary course of business, motor carriers have the benefit of a limitation of liability in their bills of lading or transportation contracts. After all, a motor carrier cannot be the virtual insurer of every high-value load. However, too often, motor carriers neglect to consider the ramifications of entering a transportation contract without a limitation of liability. For instance, earlier this year, a federal court entered judgment against a motor carrier for $5.9 million, because a load of cellphones that it was hauling was stolen. The motor carrier undoubtedly had no appreciation for the fact that it could be liable for the entire value of the load – and certainly did not have a $5.9-million cargo-insurance policy in place. The motor carrier would have undoubtedly charged a great deal more than it did for its services (or refused to haul altogether) if it knew that its exposure could approach $6 million. Consequently, every motor carrier should ensure that it has a limitation of liability in place with its customers. A limitation of liability of $100,000 to $250,000 per occurrence is fairly typical. Higher limits can be negotiated under special circumstances.

Broad, Unilateral Indemnification

A mutual indemnity obligation between a shipper and a motor carrier is fairly typical. However, increasingly, certain shippers have attempted to cram down one-sided indemnity agreements upon motor carriers. A motor carrier who agrees to indemnify a shipper for the shipper's own negligence can find itself facing extraordinary liability. For example, a shipper's negligent loading (resulting in an unstable trailer) could cause a fatal highway accident. Even though the shipper is at fault, the motor carrier may end up paying for the shipper's attorneys' fees, as well as any judgment taken against the shipper if the indemnity agreement is sufficiently broad and unilateral. Of course, while most states now have some version of an anti-indemnification statute that prohibits the enforcement of such provisions under many circumstances, the better part of caution is to avoid these provisions altogether in the first instance.

■ Lien Waiver

Motor carriers in most jurisdictions have a lien upon the freight that they are transporting in order to secure payment of freight charges. This provides the motor carrier with leverage if a payment dispute emerges between it and its shipper before the load is released. For instance, with over-dimensional loads, many factors may ultimately inform the amount due from the shipper. The parties to such contracts are not always as clear as they should be when memorializing a pricing structure. The presence of a carrier lien, which may permit the motor carrier to hold the freight "hostage" pending a resolution of the freight-charge dispute, can motivate resolution. Many shippers, however, will try to require a motor carrier to waive its lien and sacrifice this customary right. Indeed, they may even include a contractual provision imposing an award of attorneys' fees in favor of the shipper if the motor carrier attempts to exert a lien of any kind.

■ Set-off

Traditionally, the law has treated the payment of freight charges and the payment of freight claims as separate and distinct obligations. Indeed, prudent motor carriers expressly prohibit a shipper from setting off a freight claim against freight charges due and payable. However, shippers are increasingly imposing a contractual right to set off freight claims against freight charges at their discretion. Permitting such a set-off in the event of a freight claim can dramatically affect the motor carrier's cash flow. As transportation is typically a "pennies business," the unilateral setting off of a high-dollar freight claim against freight charges can functionally bankrupt a motor carrier. The shipper is essentially making itself judge and jury of the freight claim regardless of the actual merits of the claim. Similarly, the shipper will often fail to mitigate damages if it can simply perform a set-off.

■ Consequential Damages

Consequential damages are damages that flow naturally, but not necessarily, from a breach of a carrier's obligations. Examples of consequential damages include lost profits, lost customers, third-party contractual penalties, and the like. Typically, a motor carrier expects its shipper customer to waive pursuit and recovery of these damages. After all, consequential damages can be of extraordinary magnitude and are not covered by conventional cargo policies or other insurance policies. Nevertheless, more and more shippers are attempting to strike such a waiver or even include an affirmative statement that such damages are recoverable – particularly if they are involved in a "just-in-time" operation. Such contractual provisions (or even the mere absence of a waiver) could mean that a motor carrier that intended to make a tiny profit off of a load is now suddenly exposed to exponentially greater liability arising from having a plant shut down by virtue of a delayed shipment. Including a waiver of consequential damages in a transportation contract is essential.

■ No Duty to Mitigate

A basic principle of contract law is that both parties to a contract must use every reasonable means to lessen any damages caused by the other. When a freight claim arises, the shipper has the burden of proof to demonstrate the amount of damages that it has suffered. The shipper must also try to salvage the freight or otherwise mitigate its damages. This is because the shipper is likely the party who is in a better position to dispose of damaged goods since the shipper is in the business of trading in the type of merchandise involved in the first place. However, when a shipper's contract states that it has no duty to mitigate, these traditional obligations are thrown out the window. For instance, a consignee who sees one pallet with some ants crawling on it might wrongfully reject the entire load, and the shipper may conclude under the contract that it has the discretion to donate the pallets to a landfill. If the motor carrier has agreed in the contract that the shipper has no duty to mitigate, the motor carrier has now once again exposed

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itself to damages in excess of what the law would typically impose – and undoubtedly in excess of what its cargo policy will pay.

A § 14101(b)(1) Waiver

Most parties' eyes quickly glaze over when seeing a reference to 49 U.S.C. § 14101(b)(1) in a transportation contract. These parties wrongly assume that the reference to federal statute is nothing more than boilerplate "legalese," and have no idea what it means. However, a waiver under this statute has extraordinary significance because it permits parties to waive all rights and remedies granted under the Carmack Amendment if done expressly and in writing. In other words, among other things, this statute permits shippers and carriers to agree to be bound by a freight-claim liability regime other than that provided in the Carmack Amendment. In addition, it can affect overcharge and undercharge liability, freight-charge audit rules, credit rules, and the like. Perhaps most importantly, the waiver can result in the loss of federal preemption that favors the motor carrier. Reasonable people can debate whether or not one should in fact waive these rights and remedies pursuant to § 14101(b)(1) since, despite the risks mentioned above, sometimes it is to the parties' benefit to memorialize all of their rights and remedies in the contract rather than rely upon federal law as a gap filler. However, either way, sophisticated shippers and motor carriers must necessarily recognize that the waiver is an important term. One should not hastily sign a contract containing such a waiver without reflecting on the significance of doing so.

In summary, motor carriers need to be increasingly vigilant about the terms and conditions contained in the contracts that they sign so that they do not end up facing catastrophic liability that they could have otherwise avoided. Good contracts make good business partners, just as good fences make good neighbors. Moreover, good contracts can chill dubious claims. Particularly in the current, tight-capacity environment, motor carriers have leverage and can afford to push back against their shipper customers when presented with an unfair contract containing the troubling provisions mentioned above.

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