May 2015

SETTING THE TABLE

Current Issues in Food Transport, Storage and Security from Benesch's Transportation & Logistics Practice Group

But We Did Everything Right?: Why Agreements with Shippers are Necessary for Carriers to Protect Themselves from Temperature-Control Liability Under the FSMA

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As food transporters grapple with the myriad of compliance issues raised by the Food Safety Modernization Act and the FDA's looming proposed "Food Safety Rule on the Sanitary Transportation of Human and Animal Food," carriers of temperature-controlled product must be mindful that minimizing liability will require more than adherence to the language of the proposed rule in a vacuum.

In February's edition of Setting the Table, we examined how the proposed rule's total delegation of temperature requirements to shippers puts carriers in a position to face unprecedented liability for freight claims. Here, we explore a gap in the proposed rule's framework which goes further, exposing carriers to risk *even if they do everything the proposed rule asks*.

As previously discussed, the proposed rule mandates that carriers document that they have abided by shipper-determined temperature tolerances from loading through transit. To ensure strict adherence to these tolerances, the proposed rule requires recorded pre-cooling of trailers to the shipper-determined temperature prior to loading of product, and even goes so far as to mandate continuous monitoring of trailer temperatures throughout shipment.

Notably, however, the proposed rule is devoid of any requirement that the shipper prove that it has adhered to its *own standards* prior to loading. Indeed, there is no mandate that the shipper demonstrate to the carrier that its product is at the shipper-set temperature before it enters the trailer.

Loading product that is even slightly "hot" at its core can cause variations in the trailer's air temperature, in turn leading to temperatures which quickly fall outside of the shipper's specifications shortly after the trailer has pulled away from the loading dock.

The proposed rule leaves no room for error, finding even slight, temporary deviations from the shipper-determined temperature specification during shipment enough to render the food "adulterated." Thus, the proposed rule puts carriers in the position of assuming liability for the loss of product, even when it has done everything within its power to maintain FSMA compliance.

Although the FDA's proposed framework puts carriers in an unfair situation, carriers can reduce their exposure by educating their drivers on this risk and training their drivers to take the product's temperature at the time of loading. This measure alone, however, cannot provide full protection for the carrier, as the internal "pulp" temperature of the product being shipped may also differ from the external temperature of the product (or the packaging in which it is shipped). A variance in the internal temperature of the product can substantially impact the air temperature in the trailer, and thus the carrier may still be left in a position to shoulder an unfair loss.

Accordingly, to truly protect themselves from assuming this blind risk, carriers should engage shippers and seek to enter into agreements whereby the carrier is permitted to take a "pulp" temperature of a sample of product prior to shipment. In light of the proposed rule, which is quite unforgiving to carriers in its draft form, failure to fully inspect even the internal temperature of product being hauled will put carriers in the position of assuming complete loss for reasons completely out of their control.

For more information

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Chris brings additional industry experience to the firm's Transportation & Logistics Group. Having worked as a distribution manager in grocery wholesale operation for over four years prior to joining Benesch, Chris is intimately familiar with all of the "real world" operational aspects of refrigerated, frozen, and dry warehousing and distribution. Prior to joining Benesch, Chris served honorably as an Officer in the United States Marine Corps.

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