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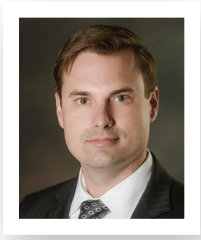
SETTING THE TABLE

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

Misguided Standards Could Cause Food Waste and Freight Claims to Skyrocket



Christopher J. Lalak

The FDA's proposed food safety rule, entitled "Sanitary Transportation of Human and Animal Food," presents significant change for all involved in the food transportation industry. In a previous issue of Setting the Table, we discussed some of these changes that were specific to warehouses.[1] In this issue, however, we examine the rule's potential to expose carriers of temperature controlled food to greater liability for freight claims than ever before.

The proposed rule mandates a series of procedures to be followed by shippers, carriers, and receivers of food. A failure to comply with these rules would render food to be considered "adulterated" within the meaning of the Food, Drug, and Cosmetic Act and thus unfit for consumption. While the proposed rule's aim is laudable, the rule's provisions regarding temperature controlled food put carriers in a particularly bad position.

The proposed rule requires shippers of temperature controlled food to provide temperature specifications to carriers. Carriers, in turn, must prove to shippers and receivers of product that the shipper-mandated temperature conditions were followed throughout the duration of the transportation. Even a brief variation from these temperature requirements would render the food "adulterated."

As numerous industry commentators to the FDA's proposed rule have pointed out, temperature guidelines set by shippers are often designed with optimal product quality conditions in mind rather than safety. In reality, optimal temperature specifications allow for a wide degree of variance before product safety would be affected. The upshot of the new rule, when paired with industry practice, is that many loads that experience even a minor, brief deviation in temperature may be deemed "adulterated"—and thus rejected by receivers—even though they are perfectly safe. Moreover, once deemed adulterated, these rejected loads would also be unfit for salvage or resale at a reduced price on the secondary market.

Under the Carmack Amendment, which generally governs freight claims for motor carriers, motor carriers are liable for "actual loss" to property. Now, a variation in temperature from an aggressive temperature standard—however brief or slight the variation may be—could represent such an actual loss, opening up carriers to a new world of liability. What's more, as the adulterated product cannot be salvaged, freight losses would be deemed total losses, raising the dollar value of many freight claims.

The FDA's final rule regarding human and animal food is expected to be published no later than March 2016, and most carriers will be given a year from the rule's publication to comply. Carriers should seek to insulate themselves from freight claims caused by temperature deviation by remaining mindful of the proposed rule's requirements, by putting a plan in place to implement constant temperature maintenance of their reefer units, and by beginning to explore with their shippers ways to address, contractually, the consequences of technical non-compliance with the proposed rules.

[1] In the Fall 2014 issue of Benesch's *InterConnect* Newsletter, **Stephanie Penninger** discussed other aspects of the proposed rule's impact.

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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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