

**OVERWEIGHTS TO PAY THE PRICE**

Jim Giermanski  
and  
David Neipert

March 1994

## Forward

The Texas Legislature established the **Texas Centers for Border Economic and Enterprise Development** during its 70th Session. The **Texas Centers** program is a consortium effort between Texas A&M International University, the University of Texas - El Paso and the University of Texas - Pan American. The primary purpose of the **Texas Centers** is to provide leadership and support to Texas border communities in their economic development efforts.

The legislature provides funds to support the efforts of the **Texas Centers** in three principal activity areas:

- 1) Development and maintenance of an economic database;
- 2) The conduct of economic development research and planning; and,
- 3) The provision of technical assistance to industrial and governmental entities.

Texas A&M International University's **Texas Center** operates under the direction of the Graduate School for International Trade and Business Administration's **Institute for International Trade** (IIT).

This report "**Overweights to Pay the Price**" by Jim Giermanski and David Neipert contributes to the goals of the **Texas Centers**.

Requests for additional copies should be directed to:

Institute for International Trade  
Graduate School for International Trade  
& Business Administration  
Texas A&M International University  
Laredo Texas 78040

J. Michael Patrick  
Director

*THE FOLLOWING ARTICLE, ALTHOUGH FOCUSING ON INTERNATIONAL APPLICATION, IS EQUALLY PERTINENT FOR DOMESTIC MOTOR CARRIER OPERATIONS.*

## **OVERWEIGHTS TO PAY THE PRICE**

A POP QUIZ!!

Tiles Inc., a U.S. company, imports tile from Mexico. As is common in Mexico, the Mexican shipper overloads the trailer with tiles destined for his U.S. customer. The overloaded trailer is carried to a Mexican border city; it is dropped and subsequently picked up by a Mexican drayage company for transfer into the United States. The Mexican transfer carrier drops off the overloaded trailer on the U.S. side in the U.S. Customs Service import lot<sup>1</sup>. Daniel B. Robinson, Inc. the U.S. customhouse broker, an agent of Tiles Inc., is notified that Tiles Inc. has a shipment ready for entry. The U.S. customhouse broker clears the goods and sends a U.S. drayage motor carrier to transfer the merchandise to the customhouse broker's warehouse for inspection and repacking. The goods were purchased "Middle of the Bridge," a term of trade commonly used along the U.S./Mexican border.

On the way to the U.S. customhouse broker's warehouse, the U.S. drayage company's driver and his load of tile are stopped by a Texas Department of Public Safety (DPS) trooper. Weights are checked, and it is found that the shipment is overloaded.

1. Is a federal or state law broken?
2. If so, who broke it?

---

<sup>1</sup>This scenario is illustrative. U.S. Customs Service on the southern border of the U.S. does not permit an import lot drop off. For northbound shipments through the U.S./Mexico border, the first U.S. firm subject to the Act would most likely to be U.S. Customs Broker or long haul carrier.

3. What fines and penalties can be assessed?
4. Who is obligated to pay the penalties and fines?
5. May a fine and penalty payer recover from a third party?
6. Is there anything the fine and penalty payer can do to compel reimbursement?

#### NEED FOR LEGISLATION

The October 1991 report of the Texas Department of Commerce entitled Texas Consortium Report on Free Trade pointed out that motor carrier regulators, city officials, private citizens and even U.S. truckers themselves are concerned about overweight shipments and their impact on roads and highways and the safety of others who must share these same roads. Additionally, testimony in Oakland California in 1985 revealed that the California Highway Patrol found approximately 72% of the trucks they weighed in port areas were overweight. The harm of overweight vehicles was highlighted in Greg P. Streffre's 1990 Briefing Paper - Intermodal Overweight Containers. For years the American Trucking Association (ATA) has recommended legislation to correct the problem. But as is often the case a tragic accident is needed to move on this issue. That tragedy occurred in Minneapolis on March 12, 1992 when a 42,000-pound container of imported goods loaded on a five-axle rig tipped over during a short local drive crushing a car and killing its occupant. The container-rig combination exceeded the legal weight limit by 20,000 pounds. On October 28, 1992, seven months after the

tragedy, Public Law 102-548, Intermodal Safe Container Transportation Act of 1992 was enacted.

#### WHO'S SUBJECT TO THE LAW?

Shippers and others who pack, forward, and carry intermodal containers or trailers of a projected gross weight of more than 10,000 pounds may face some weighty penalties in the future from both federal and state authorities as a result of the Intermodal Safe Container Act of 1992 (to be contained in Title 49 of the U.S.Code). The handling of overweight containers or trailers, or those with hazardous contents, has been a heavy burden figuratively as well as literally to cargo handlers throughout the chain of distribution, and a safety problem for the general public. The new law attempts to take the weight off their unknowing shoulders, and places it squarely upon the shoulders of original shipper. The shipper must give a written report of the actual gross weight and a description of the contents of each trailer or container whenever he offers it to an initial carrier for transportation.

However, carriers and their agents, brokers, customs brokers, freight forwarders, warehousemen, and terminal operators are obligated to forward the information to the next carrier in the chain, but they are not obligated to correct any false information. They are merely liable to pass along the information they have received. While it does appear to be illegal for them to forward a trailer or container with no information on weight and contents at all, it is legal for them to forward a container

with information they know to be false if the false information was provided by the original shipper.

Since there are as yet no interpretative appellate cases to review, one can only speculate upon how the Act will be viewed by the courts. The wording of the Act appears to be quite straightforward however, so we do not feel too uncomfortable in making a few guesses regarding the law's effect upon some members of the distribution chain.

Upon first glance, motor carriers seem quite safe from the federal penalties of the Act itself, if they forward shipper's certification. Unfortunately, the defense does not appear to extend to other federal and state penalties involving overweight vehicles. Federal fines and penalties may range from \$500.00 to \$10,000.00. The Act authorizes the states to seize trailers or containers which are overweight under state highway regulations and hold them until the fines and penalties are paid by the owners of the trailers. Trucking companies are therefore not entitled to rely upon the original container certification to guarantee that the entire vehicle is not overweight and should make an independent determination of vehicle gross weight. Naturally, if the original certification is false, the carrier would have a cause of action under either contract, fraud, or negligence law against the shipper, but if the shipment originated abroad, such a cause of action may be hard to pursue.

## REIMBURSEMENTS AND REMEDIES

In the case of a certificate giving erroneous information, the law does give the carriers the right to place a lien against the cargo to satisfy any fines or penalties assessed as a result of the misinformation, but it does not provide for compensation for loss of the use of the trailer. And, again, if the shipper is a foreign entity and the transfer-of-title point (depending on the terms of trade used) has been passed at the time of the seizure, the lien may be difficult to enforce against the original shipper. Instead, the lien may be enforced against the "owner or beneficial owner" of the cargo seized.

Interestingly, the lien is against the contents of the container only, not the container itself. The motor carrier who keeps a container to enforce its lien is placed unwittingly in the position of bailee with regards to the container and the contents. In other words, the one who keeps the trailer and cargo is responsible for them. This situation is fraught with risks. In fact, since the cargo is no longer in transit, it may not be covered by normal insurance. Upon demand, it appears that the carrier must surrender the container to its owner upon the exercise of his lien against the contents or subject himself to a lawsuit for replevin (return of the goods). After stripping the container to return it, the carrier may be responsible for the content's safe storage. This could result in considerable potential liability to the carrier attempting to enforce such a lien. Therefore, the carrier should review his insurance coverage to ensure that he is insured for this risk.

## ITS IMPACT ON OTHERS THAN THE SHIPPER

The law gives the buyer new headaches, particularly from state highway regulations. If a truck is seized for being overweight, the "owner or beneficial owner"<sup>2</sup> of the container's cargo is liable for the fine and penalties. One might assume that the fine and penalties should only be assessed against the container contents if the certification was false, but the law does not specifically limit the state's power to that circumstance. In fact, it appears to bind the container's contents to satisfy the fines and the penalty if the truck is overweight even if the certification is correct and the carrier is totally at fault!

## INTERNATIONAL SHIPMENTS

### 1. Drayage

The entire genre of middlemen, such as freight forwarders, brokers, customs brokers, warehousemen, and terminal operators, seem to satisfy their obligations if they merely pass along the information they receive from the original shipper and do not try to coerce anyone to haul the container before they receive and pass along the weight and contents certification. A possible exception to this security blanket for the middlemen might occur when the container is stripped for inspection, consolidation or otherwise unloaded and reloaded. This sort of handling commonly occurs and is evidenced by the broker's invoice to the importer,

---

<sup>2</sup>The owner and beneficial owner normally include both the buyer and seller.



for example, when a Mexican customs broker prepares his documentation on the U.S. side of the border for entry of the goods into Mexico. Such an action might place the middleman who performs this service in the category of original shipper for purposes of the Act and subjects him to various fines and penalties if the certificate of weight and contents is false or not provided by the carrier.

The whole practice of international drayage or transfer operations between Mexico and the United States may subject those in both the southbound and northbound freight forwarding business, including the U.S. customhouse broker, to the fines and penalties of this Act. Motor carrier activities in the border commercial zones involving overweight commercial intermodal shipments are subject to this Act and depending on state law, DPS enforcement. Therefore, the shipment or transfer of goods between and among warehouses, terminals, and to and from Mexico fall within the Act's jurisdiction and concomitantly within the jurisdiction of state enforcement authorities.

## 2. Foreign U.S. Shippers

In Mexico, however, there are many U.S. operations whose parents reside in the United States. These companies which include such firms as Ford, GM, and Handy and Harman, routinely ship large quantities of merchandise to the United States via Mexican motor carriers known to carry overweight shipments. Will these firms only ship U.S. legal loads? Will they be responsible as if they were located in the United States? Will the Mexican motor carrier that has an interlining agreement (contract) with a

U.S. motor carrier be an extension of the U.S. carrier which under the appropriate circumstances is clearly subject to the Act? The question is to what degree will U.S. shippers in Mexico fall within the jurisdiction of U.S. courts. It may be too early to answer these questions given the lack of case law. Nonetheless, one may easily make the linkage.

Regarding international shipments, then, there is clearly a need for independent verification of the original shipper's certification of the weight and contents of the container. Both the carrier and the buyer are in a position to take a financial loss if the certification is wrong, and the original shipper will often be beyond the jurisdiction of U.S. courts when the litigation begins. As we see it, weight will be the biggest problem as the contents of containers in international commerce are generally carefully documented for customs purposes.

Most of the potential problems under this Act would be avoided if the containers were weighed by an independent, trustworthy organization either at the F.O.B. point or prior to their delivery to the first U.S. carrier, whichever is earlier. This service is a potential business opportunity. As a practical matter, it is the carriers who logically should assume the responsibility that their vehicles and the containers they carry are not overweight. The buyers could reduce their risks by a clause in the bill of lading by which the carrier indemnifies them for any fines and penalties under the Act asserted against their cargo.

NOW, HOW DID YOU SCORE?

1. Is a federal or state law broken?

Yes, the federal **Intermodal Safe Container Act of 1992**.

The law also gives the state and its political subdivisions (a border city, for instance) the right to enact legislation and assess fines to enforce the Act.

2. If so, who broke it?

Because our Mexican shipper did not originate a certificate of weight and contents, the first U.S. entity receiving the shipment from the Mexican carrier (the U.S. drayage company) should have issued a certificate of weight and contents in order not to be in violation of the law. If the Mexican shipper issued a certificate, the U.S. drayage company would have to pass it along to the next level in the distribution chain subject to the Act.

3. What fines and penalties can be assessed?

Federal fines and penalties for this Act are codified in 49 USC 521 (b) (2) (a). They are \$500.00 per day per container/trailer up to a maximum of 5 days or \$2,500.00. However, if a serious pattern of violation is evident, the U.S. Department of Transportation may raise the dollar amount to \$1,000.00 per day for ten days or \$10,000.00. No criminal federal sanctions have been written into the law. State and local government sanctions will vary from state to state but will likely expose those under the act to substantial financial burden. Therefore state legislators and local government leaders

will soon move to increase these penalties given the authority and purpose of the federal law.

4. Who is obligated to pay the penalties and fines?

The drayage motor carrier transporting the merchandise to U.S. customhouse broker Daniel B. Robinson, Inc., or "beneficial owner".

5. May a fine and penalty payer recover from a third party?

Yes, in this case the motor carrier may require the owner to reimburse the carrier for any fines or penalties. Since, our term of trade was "Middle-of-the-Bridge," the owner was `Tiles, Inc. Therefore, Tiles Inc., the U.S. importer and owner, may not receive his merchandise in a timely fashion and perhaps not at all until it reimburses the drayage company."

6. Is there anything the fine and penalty payer can do to compel reimbursement?

Yes, if the originator of the certificate of weight and contents caused a false certificate to be made, the originator opens itself up to the allegation of fraud and corresponding legal remedy in the appropriate jurisdiction. Therefore, in our scenario, if the Mexican shipper originated a false certificate, the payer of the fines and penalties might be able to seek remedy in a Mexican court, although highly unlikely. But if the Mexican shipper was General Motors operating as a maquiladora in Mexico, it would be an interesting legal issue.

It is time that steps be taken to rectify the overweight abuses by motor carriers operating in the United States. Only time will tell if this new law has enough teeth or whether it turns out to be only an annoying gumming.