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## Transborder - Road Transportation.

H.N. Cunningham III

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## TRANSBORDER - ROAD TRANSPORTATION

H. N. CUNNINGHAM III\*

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### I. INTRODUCTION

This article is intended to serve as a primer for attorneys representing clients engaged in shipping, receiving, and transporting merchandise over the road between points in the United States of Mexico (Mexico) and the United States of America. A "crazy quilt" of laws and regulations govern the rights, duties, and obligations of persons engaged in these activities. These laws include not only the constitutions and statutes of two independent nations, but also the laws and regulations of their various political subdivisions as well. Due to the breadth of this material, this article's treatment of the subject is necessarily general, providing an overview of the laws directly affecting transborder road transportation.

Besides providing a general background as to the operation of the present transborder system, specific issues to be touched on within this article include the economic regulation of motor carriers; the ap-

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plication of tax, customs, insurance, and safety laws and regulations to carrier equipment; the application of labor and immigration laws and regulations to carrier employees; and the application of negligence and contract laws and regulations to the transportation of cargo in both Mexico and the United States.

## II. BACKGROUND

Transborder transportation is not something new. Merchandise has been moving over land between Mexico and the United States since before Mexico gained independence from Spain. At present, a system exists that allows for the movement of merchandise between points in Mexico and the United States. Under the present system, road transportation service is provided on a joint line basis, merchandise being transshipped at the border. The system is, however, inefficient and not conducive to the North American "free trade" zone envisioned by the Mulroney, Bush and Salinas administrations. The system is not competitive with the single line service presently available on transborder shipments moving between points in the United States and Canada; or shipments moving wholly between points in Canada, the United States, or Mexico. Single line transportation is defined as one carrier transporting a shipment from origin to destination. The present system, if unimproved, will adversely affect Mexico's ability to compete in the North American marketplace. Various factors prevent carriers from providing single line service over the road between points in Mexico, on the one hand, and points in the United States, on the other. Cross border operations are impeded by existing law, highway infrastructure, equipment configuration, language, and culture.

To understand the "crazy quilt" of laws and regulations affecting transborder road transportation, it is important to know something about the workings of the present transportation system and its history. It is a system composed of various players and competing transportation modes.

## III. HISTORY

Both the United States and Mexican road transportation systems developed in a heavily regulated environment. Initially, both governments and their political subdivisions exercised broad control over their respective transportation systems. The United States and Mexico not only prescribed and enforced safety standards, they also be-

came directly involved in the economic regulation of their transportation systems. They exercised control over the number of carriers providing service in their market and the pricing of those services. They regulated competition in an effort to protect and foster their respective transportation industries. Authority to operate as a carrier was difficult to obtain. Carrier supply was artificially limited. A return on carrier investment was virtually guaranteed. Transportation companies in both countries were treated as public utilities.

In the United States, the Interstate Commerce Commission was charged with the economic regulation of interstate for-hire motor transportation.<sup>1</sup> Various states established agencies with similar responsibility for intrastate carriers.<sup>2</sup> Responsibility for safety came to rest with the United States Department of Transportation and various state agencies.<sup>3</sup> In Mexico, the responsibility for both economic and safety regulation was given to the Secretary of Communication and Transport.<sup>4</sup>

Beginning in the 1970s in the United States, and later in Mexico, there was a clamoring for free, open competition in the motor carrier industry. Economists turned their backs on Keynes and returned to the theories of Adam Smith. At the U.S. federal level, this culminated with the Motor Carrier Act of 1980 which, though labeled "deregulation," merely eased certain "protectionist" policies.<sup>5</sup> Market entry was opened up and carriers were given wide latitude in pricing their services. Enforcement was curtailed.

Following the trend, Mexico "deregulated" its motor carrier industry in 1989. Mexican nationals were allowed to enter the market as carriers with ease and rate regulation was effectively done away with.<sup>6</sup>

Although "competition" is now the "watchword" on both sides of the border, Mexico and the United States still exclude each other's nationals from operating motor carriers in their respective countries.

1. 49 U.S.C. §§ 10101, 10321, 10521(a)(1)(A) - (B) (1988).

2. In Texas, for example, the Texas Railroad Commission regulates intrastate for-hire motor transportation. TEX. REV. CIV. STAT. ANN. art. 911a, § 4 (Vernon 1989) & art. 911b, § 4 (Vernon 1991). For a list of state agencies and regulations, see Daniel W. Baker, *TLA's 7th Annual Report and Summary of Motor Carrier Regulation by the Respective States*, YOUR LETTER OF THE LAW, Mar. 1991, at 19-23.

3. 49 U.S.C. § 322 (1988).

4. Ley de Vías Generales de Comunicación art. 3 (1990).

5. Motor Carrier Act of 1980, Pub. L. No. 96-296, § 3, 94 Stat. 793, 793.

6. See Reglamento para el Autotransporte Federal de Carga, D.O., Jul. 7, 1989, at 284-64-61.

Mexico, having had problems with foreigners in the past, adopted a nationalistic policy limiting foreign investment as a means of insuring its continued independence.<sup>7</sup> Mexico's constitution gives preference to its nationals over foreigners, and its laws specifically reserve the operation of for-hire motor carriers exclusively for Mexican nationals and Mexican companies with an "exclusion of foreigners clause."<sup>8</sup>

In 1982, the United States, primarily in reaction to perceived discrimination by the Canadian government against the United States for-hire carriers, passed a law prohibiting the control of carriers operating in the United States by foreign nationals of contiguous nations whose governments prohibited ownership of their carriers by United States citizens. This has been applied to for-hire and private carriers alike, and prohibits foreign carriers from operating across the United States between Mexico and Canada. Foreign carriers that held United States authority prior to passage of the act were grandfathered, and limited operations of foreign carriers is permitted in commercial zones along the international borders. It has since been determined that Canada does not discriminate against U.S. citizens, but the law remains in effect as to Mexican nationals.<sup>9</sup> The State of Texas has also become involved and is attempting to prohibit Mexican nationals from operating motor carriers in Texas.<sup>10</sup> Obviously, the United States constitution may affect this attempt.<sup>11</sup>

#### IV. TODAY'S SYSTEM

There are three primary participants in today's transportation system. They are carriers, middlemen, and users. Carriers generally provide transportation service. They contract for and accept responsibility for getting merchandise from origin to destination. Middlemen simply undertake to arrange for someone else to provide transportation service. Users rely on the transportation system to move merchandise.

Middlemen generally act as shippers' agents, carriers' agents or

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7. "Pobre Mexico tan lejos de dios y cerca a los estados unidos." Literal translation: Poor Mexico, so far from God and close to the United States.

8. CONST. arts. 4, 32 (Mexico) *reprinted in* DOING BUSINESS IN MEXICO, pt. I, app. A (Michael W. Gordon ed., 1991).

9. 49 U.S.C. §§ 10530, 10922(L)(1) (1988).

10. TEX. REV. CIV. STAT. ANN. art. 911b, § 18b (Vernon 1991).

11. U.S. CONST. art. I, § 8, cl.3.

brokers.<sup>12</sup> As with carriers, they may or may not be regulated. In today's environment, it is often difficult to distinguish a middleman from a carrier. While a middleman may issue bills of lading and charge for transportation service, they are generally not required to maintain insurance. Payment to a middleman may not satisfy a liability to a carrier.<sup>13</sup>

Users generally control the routing of freight and accept responsibility for paying freight charges.<sup>14</sup> Generally, a user is referred to as a shipper. Users may include consignors, consignees, or third parties with a beneficial or ownership interest.<sup>15</sup> In today's environment, it is also often difficult to distinguish a user from a middleman.

## V. U.S. CARRIERS

In the United States, most major carriers provide service between points throughout the forty-eight contiguous states and Canada. A number of carriers enjoy revenues in excess of one billion dollars a year and operate thousands of tractor trailer units. Most carriers operate terminal facilities strategically placed throughout their systems. Carriers typically operate one and a half to two trailer units for each tractor unit. Carriers are generally categorized by the nature of their operations. The rights, duties, and obligations of motor carriers and of the persons dealing with them may be directly affected by the type of carrier involved.

Motor carriers are categorized as regulated, unregulated, or exempt; interstate or intrastate; private or for-hire; common or contract. In today's environment, a motor carrier may engage in activities that would place it in all of these categories.

Whether or not a carrier is regulated, unregulated, or exempt is determined from the merchandise it transports or the territory in which it transports merchandise. A regulated carrier, besides being subject to insurance, safety, and other general laws and regulations, is subject to the jurisdiction of an administrative agency, either state or federal, which regulates the economic side of the carrier's business.<sup>16</sup>

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12. 49 U.S.C. §§ 10102(1), (9), 10321, 10921 (1988); 49 C.F.R. pt. 1045 (1990).

13. *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 352 (1982); *Metro Shippers, Inc. v. Life Savers*, 509 F. Supp. 606, 608-09 (D. N.J. 1980).

14. 49 U.S.C. § 10744 (1988).

15. *Pomerene Bill of Lading Act*, 49 U.S.C. app. §§ 81-124 (1988).

16. 49 U.S.C. §§ 10501 *et seq.* (1988) (defines what constitutes regulated, unregulated,

The agency may control competition and may prescribe regulations and enforce laws affecting pricing, claims handling, and contractual and labor relations. Unregulated and exempt carriers, on the other hand, may operate free from such oversight.

Generally, whether or not a carrier is an interstate or intrastate carrier is determined from the nature of shipments it transports.<sup>17</sup> A carrier engaged in transporting shipments with origins in one state and destinations in a different state or foreign country will be categorized as an interstate carrier. A carrier transporting shipments with origins and destinations in the same state will probably be categorized as an intrastate carrier. The intended origin and destination of a shipment, not its movement by the carrier, determines the category of the service provided. U.S. federal laws, in many instances, apply to the interstate carrier but do not apply to the intrastate carrier, and state laws which, in many instances, apply to the intrastate carrier but do not apply to the interstate carrier.

Whether a carrier is private or for-hire is determined by its relationship to the merchandise it is hauling.<sup>18</sup> A carrier that hauls its own merchandise or merchandise used in its "primary business" is a private carrier. A carrier that hauls the merchandise for others is normally a for-hire carrier. As a rule, private carriers are not subject to economic regulation.

Generally, whether a carrier is common or contract is determined by the type of relationship it has with its customers and the type of authority it holds if its operations are regulated. A common carrier provides service to the public in general.<sup>19</sup> Its rates and services are normally contained in a tariff and its duties, rights and obligations are usually spelled out in a law or regulation, including the carrier's responsibility to the user for lost or damaged merchandise.<sup>20</sup> A contract carrier provides service for a limited number of customers

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and exempt interstate transportation). At the state level, Texas, for example, defines regulated, unregulated, and exempt transportation at TEX. REV. CIV. STAT. ANN. art. 911b § 1 (g)-(j), § 1a (Vernon 1991).

17. See *Southern Pac. Transp. Co. v. I.C.C.*, 565 F.2d 615, 617 (9th Cir. 1977); *United States v. Majure*, 162 F. Supp. 594, 598 (D. Miss. 1957); *Armstrong World Indus., Inc.—Transp. within Tx.—Pet. for Decl. Order*, 2 I.C.C.2d 63, 69 (1986).

18. See 49 U.S.C. § 10524(a) (1988); *Red Ball Motor Freight v. Shannon*, 377 U.S. 311, 314 (1964); *L.A. Woitishak Common Carrier Application*, 42 M.C.C. 193, 205 (1943).

19. 49 U.S.C. § 10102(14) (1988).

20. 49 U.S.C. §§ 10761(a), 11101 (1988).

routinely, either dedicating equipment or providing customized service for its user.<sup>21</sup> The carrier typically enters into a contract with its user which spells out many of its duties, rights and obligations.<sup>22</sup> The services it undertakes to perform and the rates it will charge for those services are set out in the contract and its rate schedule.

Carriers may also be categorized based on whether they are transporting general commodities or specialized commodities, e.g., over-size, overweight commodities, household goods, packages, bulk commodities, or hazardous materials. They may be further categorized based on the size of shipments they haul: a truckload (TL) or less than a truckload (LTL). This information is useful in determining if the carrier is subject to special laws or regulations, or which tariffs it may participate in.<sup>23</sup>

## VI. MEXICAN CARRIERS

In contrast, the Mexican road transportation system is far less developed. Mexican carriers are either categorized as private or for-hire. They are regulated by the Secretary of Communication and Transport. Those regulations roughly mirror those propounded by the United States Department of Transportation and Interstate Commerce Commission. Mexican states exercise far less control over transportation than their U.S. counterparts. The Mexican carriers' rights, duties and obligations are spelled out in laws and regulations. Those affecting the relationship between the carrier and its user are primarily contained in the Mexican Commercial Code and the Secretary of Communication and Transport's motor transportation of cargo and model bill of lading regulations. Mexican carriers are much smaller in size and are under-capitalized in comparison to their U.S. counterparts.

A typical Mexican carrier provides services between a limited number of points by operating a handful of trucks. For example, it may provide service between Monterrey, Nuevo Leon, and Nuevo Laredo, Tamaulipas. It is family owned and operates more tractor

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21. 49 U.S.C. § 10102(15) (1988).

22. 49 U.S.C. § 10764 (1988); 49 C.F.R. pt. 1053 (1990).

23. *See, e.g.*, Hazardous Materials Transportation Act, 49 U.S.C. app. §§ 1801-13 (1988); 49 C.F.R. pts. 171, 177 (1990); *see also* Household Goods Transportation Act, Act of Oct. 15, 1980, Pub. L. No. 96-454, 94 Stat. 2011 (codified in scattered sections of 26, 28, 39, & 49 U.S.C.); 49 C.F.R. pt. 1056 (1990).



equipment than trailer equipment, relying on trailer equipment interlined from U.S. carriers to supplement its fleet. It does not operate a terminal of its own, but is a member of a "*central de carga*," a local carrier organization that provides a terminal facility for its members. Prior to 1989, all Mexican carriers were forced to be members of their local "*central de carga*," and members of the national trucking association, CANACAR.<sup>24</sup>

Most carriers involved in transborder road transportation were controlled by Mexican customs brokers who had control of most international traffic. The brokers operated warehouses at the various ports of entry along the international border and, oftentimes, had affiliates on the U.S. side. The control exercised by these brokers was effectively ended by the Salinas administration in 1990.<sup>25</sup> Today, membership in CANACAR is still required, but the monopoly of the "*central de carga*" and the customs brokers has been broken. Carriers may now operate independently.

The Mexican motor carrier industry is presently in a state of transition. Free market forces will probably result in the same reduction in profit margins experienced in the United States and Canada. This should be followed by an economic "shake out" and consolidation. As a result, there will be fewer motor carriers providing a broader range of services throughout larger territories. Although Mexican carriers are afraid they will be put out of business if U.S. carriers are allowed access to Mexico, they are looking to the U.S. carriers to provide them with capital.

## VII. COMPETING MODES OF TRANSPORTATION

Besides competing among themselves, motor carriers also compete with transportation companies providing service, in other modes. Such companies include railroads, steamship lines, and air carriers. However, in today's market, one company may engage in intermodal operations: operating a truck company, a railroad, a steamship line, and an airline. Further, a single shipment may move on several modes, moving on an intermodal basis—truck trailers routinely move on shipboard ("fishy back") or on rail car ("piggy back"). Packages may move by air or be delivered by truck. A land shipment may be

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24. Oficio 121-631-89-1563 Estatatos Camara Nacional del Autotransporte de Carga, D.O., Sept. 29, 1989.

25. La Ley Aduanera, D.O., Sept. 29, 1989, art. 143.

subject to the contractual terms of an ocean waybill or air bill.<sup>26</sup>

Generally, in dealing with a transportation problem, it is important to identify which transportation mode is involved. The rights, duties and obligations of the parties may be directly affected. It is dangerous to assume that, merely because a truck is involved, the problem involves a motor carrier. You may be dealing with a steamship company or some other mode of transportation.

### VIII. TRAFFIC PATTERNS

Today, Mexico is the United States' third-largest trading partner, behind Canada and Japan. The United States is Mexico's largest trading partner. In 1990, the total trade between these countries exceeded fifty-eight billion dollars. Today, eighty-five percent of all traffic moving between Mexico and the United States moves over the road. Traffic crosses between Mexico and the United States at ports of entry along the international boundary. Those ports of entry include Laredo, Del Rio, Eagle Pass, Roma, Rio Grande City, Hidalgo, Progreso, Presidio, Brownsville, and El Paso, Texas; Fabens and Columbus, New Mexico; Nogales, San Luis, Lukeville, Sasabe, Naco, and Douglas, Arizona; and Otay Mesa, Tecate, Calexico, and Andrade, California.<sup>27</sup>

Shipments moving between Mexico and the United States are handled by regulated or exempt interstate carriers on the U.S. side. These carriers are subject to United States Department of Transportation insurance and safety regulations, and state safety and traffic regulations.<sup>28</sup> Drivers and vehicles are licensed under state law.<sup>29</sup> In addition, regulated carriers are subject to the United States Interstate Commerce Commission's regulations.

On the Mexican side, the shipments are handled by carriers subject to the Secretary of Communication and Transportation regulations. Drivers and vehicles are registered with the secretary.

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26. Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15 (1988); International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233 (1937); Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000 (1934) (Warsaw Convention).

27. AMERICAN TRUCKING ASS'N, INC., U.S.—MEXICO TRANSBORDER TRUCKING: A PRACTICAL GUIDE TO TRUCKING IN MEXICO § II (draft Oct. 13, 1991).

28. 49 C.F.R. pts. 387, 390-99 (1990).

29. *See generally* INTERNATIONAL REGISTRATION PLAN, (Am. Ass'n of Motor Vehicle Adm'rs 1973) (amended 1982).

Drayage carriers are often used to shuttle shipments across the border. Their role is limited to transporting the involved goods from one customs yard to another. In the past, most drayage carriers were operated by Mexican customs brokers. Equipment and drivers used in providing drayage service were normally qualified on both sides of the border.

Mexican carriers may obtain a certificate of registration from the Interstate Commerce Commission to operate through a port of entry into a U.S. border city commercial zone. This enables Mexican carriers to operate as drayage carriers. They can pick up and deliver international shipments in the United States. Further, provided their drivers are qualified to work in the United States, they may provide service in interstate commerce between points in the commercial zone.<sup>30</sup> They may also transport intrastate shipments within a zone, provided they hold the appropriate authority.

To operate in a U.S. border city commercial zone, the Mexican carrier must comply with all U.S. laws. It must provide proof of insurance and payment of U.S. federal heavy vehicle use tax.<sup>31</sup> Insurance may be purchased on a one trip basis. Its U.S. operations are subject to United States Department of Transportation safety standards, including those affecting drivers, equipment, and hazardous materials.<sup>32</sup> Strict weight and dimensional restrictions apply to its equipment and loads. The Mexican carrier may find itself subject to a whole range of U.S. federal, state, and local taxes.<sup>33</sup>

U.S. carriers may not engage in drayage operations. Again, U.S. carriers are barred from operating into Mexico.

A typical shipment is handled by three separate transportation companies in the course of an international movement between Mexico and the United States. It is picked up at origin, taken by the originating carrier to the border, turned over to a drayage carrier to be shuttled across the border and finally transported by a delivering carrier for final delivery to the destination.

Each company was hired separately by the user or middleman to provide a leg of the movement. Usually, each carrier acts independently, each issuing its own bill of lading. They generally refuse to

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30. 8 U.S.C. § 1101(a)(15)(B) (1988).

31. 26 U.S.C. § 4481 (1988); 49 U.S.C. § 10927 (1988).

32. 49 C.F.R. pts. 390-99 (1990).

33. See generally TEX. TAX CODE ANN. ch. 157 (Vernon 1982).

accept responsibility for the performance of the other carriers participating in the move. Each carrier has separate rights, duties, and obligations to the user.

The system is inefficient and costly. It increases chances of delay, loss, and damage. Again, it is not competitive with the single line transportation presently available on shipments moving between points wholly within one country; or between points in Canada and the United States.

### IX. THROUGH SERVICE

Recently, a number of U.S. motor carriers have begun holding themselves out to the public as providing through-service between points in the United States and Mexico. They are quoting through-rates for this service and issuing single through-bills of lading. They are accepting responsibility for loss, damage, and delay that may occur to a shipment while *en route*. As U.S. motor carriers may not operate as motor carriers in Mexico, they are providing this service in close cooperation with selected Mexican carriers. This generally involves the U.S. and Mexican carriers entering into interchange and interline agreements. U.S. trailer equipment is turned over to Mexican carriers at the border and used to transport the shipment to final destination. Trailer equipment is temporarily imported into Mexico and is covered by a general Mexican customs bond or *fianza*.

An interchange agreement is an agreement providing for the loan of trailer equipment by one carrier to another. It generally spells out the responsibilities and duties of each carrier in regard to receipt and return of the equipment, taxes and liability to third parties, and damage to equipment. It generally includes an inspection report. Interchange agreements are standard. A sample interchange agreement is included as *Appendix A* to this article. Obviously, it requires adjustment.

The interline agreement, on the other hand, establishes the working relationship between the carriers in providing joint line service on transborder shipments. It is not standard by any means. It spells out how rates are to be divided between the carriers; who is responsible for providing what services; who is responsible for loss, damage, and delay claims; who is responsible for taxes, customs duties, insurance, compliance with laws and regulations affecting safety; the licensing and qualification of equipment and drivers; and liability to third parties. It may provide for exclusivity of the relationship and indemnifi-

cation. Agreements to be effective in Mexico may need to be pre-approved by the Secretary of Communication and Transport.<sup>34</sup>

Several U.S. carriers are providing terminal and warehouse facilities in Mexico for their Mexican interline carrier partners. They are, to a certain extent, assuming the roles of the "*central de carga*" and Mexican customs brokers. These U.S./Mexican carrier teams work closely to expedite shipments and are providing a service that roughly approximates the single line service presently available to transportation users in the United States and Canada.

#### X. CARGO LOSS, DAMAGE, AND DELAY

A user experiencing loss, damage, or delay of a shipment moving over the road between Mexico and the United States may have great difficulty determining who is liable for loss, damage, and delay, and to what extent.<sup>35</sup> Unfortunately, neither the United States nor Mexico are signatories to the Inter-American Convention on Contracts for International Carriage of Goods by Road.<sup>36</sup> If the United States, Mexico, and Canada became signatories to the agreement, much of the confusion would be eliminated from this area of the law. Carriers, middlemen, and users would have a better understanding of their duties, rights, and obligations on transborder shipments.

Where a shipment is handled by a number of carriers on a segmented basis, a shipper should begin by reviewing the bills of lading and inspection reports to determine on whose leg of the movement the loss, damage, or delay occurred. Carriers, users, and middlemen normally note the condition of the merchandise on the bill of lading at the time of receipt or delivery. A clear bill of lading is generally prima facie evidence that the merchandise was received or delivered in good condition.<sup>37</sup> Where loss or damage occurs to a shipment on a regulated U.S. common carrier, the user's rights are governed under the Carmack Amendment to the Interstate Commerce Act.<sup>38</sup> The

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34. Ley de Vías Generales de Comunicación art. 8 (1990).

35. See, e.g., *Reider v. Thompson*, 339 U.S. 113, 117 (1950); *Mexican Light & Power Co. v. Texas Mexican Ry. Co.*, 331 U.S. 731, 734 (1947).

36. Inter-American Convention on Contracts for the International Carriage of Goods by Road, 29 I.L.M. 81, 81 (1990).

37. *Cummins Sales & Serv., Inc. v. London & Overseas Ins. Co.*, 476 F.2d 498, 500 (5th Cir.), cert. denied, 414 U.S. 1003 (1973).

38. Carmack Amendment to Hepburn Act, Pub. L. No. 59-337, 34 Stat. 595 (codified as amended at 42 U.S.C. §§ 10103, 10730, 11707 (1988)).

Carmack Amendment governs carrier liability on shipments moving between points in the United States and shipments originating in the United States and destined to foreign countries. There is some question regarding Carmack's application to shipments originating in a foreign country and destined for the United States. Carmack does not apply on motor carrier shipments moving between Mexico and Canada. Under Carmack, a U.S. regulated common carrier is basically an insurer of the merchandise, and the user is entitled to recover actual loss or damage to the merchandise, unless the carrier proves that the loss or damage was the result of an act or omission of the user or its agent, a public enemy, an act of God, or an inherent vice in the merchandise and that the carrier is free from negligence.<sup>39</sup> To recover, a user must file a written claim with the carrier within a prescribed time period, normally no less than nine months. If a carrier denies a claim, the user must file a lawsuit within a prescribed time period, normally within two years and a day.<sup>40</sup> A user must make a prima facie case: proving that the merchandise was received by the carrier in good condition and either lost or delivered in damaged condition. The user need not prove that the carrier was negligent.<sup>41</sup> The carrier may limit its liability to an amount less than the actual damage through a release rate item in its tariff.<sup>42</sup> A common carrier is normally not liable for special or consequential damages unless it is proven to have had knowledge of the likelihood of such damage at the time of the movement.<sup>43</sup>

Where the loss or damage occurs to a shipment on a regulated contract carrier, a user should look to its contract with the carrier to determine its rights, duties, and obligations. Where the involved carrier is an exempt carrier, the user should look to its contract with the carrier and to state law.<sup>44</sup>

Where the loss or damage occurs to a shipment on a Mexican carrier, the user's rights are governed under the Mexican Commercial

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39. *S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R.*, 695 F.2d 253, 256 (7th Cir. 1982); *Johnson & Johnson v. Chief Freight Lines*, 679 F.2d 421, 421-22 (5th Cir. 1982).

40. 49 U.S.C. § 11707(e) (1988).

41. *Missouri Pac. R.R. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964).

42. 49 U.S.C. § 11707(c) (1988).

43. *See Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (1854); *see also Reed v. Aacon Auto Transport, Inc.*, 637 F.2d 1302, 1306 (10th Cir. 1982); *Contempo Metal Furniture Co. v. East Tex. Motor Freight Lines*, 661 F.2d 761, 765 (9th Cir. 1981).

44. *See TEX. BUS. & COM. CODE ANN.* § 2.319 (Tex. UCC) (Vernon 1968).

Code and the Secretary of Communication and Transport's motor transportation of cargo and model bill of lading regulations. The Mexican carrier is obligated to take care of and preserve the merchandise while in his possession and to pay the consignee for any loss or damage for which the carrier is responsible.<sup>45</sup> It may avoid liability by proving that the loss, damage, or delay was not caused through its fault or negligence.<sup>46</sup>

Further, a claim against a carrier must be made at the time of delivery and a lawsuit must be brought within six months of movement on Mexican shipments, and within one year on shipments made into Mexico from foreign countries. The terms and conditions of the model bill of lading limit a consignee's recovery on damaged or lost merchandise. Damage for delay is based on an agreed liquidated amount. Measures of damage are nominal.

#### XI. CONCLUSION

If the North American free trade zone is to become a reality, it must have a viable road transportation system. It is imperative that merchandise move between all points in Canada, the United States, and Mexico in a fast, safe, and efficient manner without undue delay. To accomplish this, the carriers of these three nations must be allowed to operate without hindrance. The rights, duties, and obligations of carriers, middlemen, and users must be clearly defined and enforced. The present system meets none of these prerequisites.

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45. Reglamento para el Autotransporte Federal de Carga, D.O., Jul. 7, 1989, arts. 65-66, at 284-64-73.

46. *See generally* Modelo de Carta de Porte, Circular 222, D.O., Dec. 29, 1955, at 284-69.

A P P E N D I X A  
 MODEL NORTH AMERICAN  
 INTERCHANGE AGREEMENT

This Agreement is entered into between \_\_\_\_\_ of \_\_\_\_\_, the "Owner" and \_\_\_\_\_ of \_\_\_\_\_, the "User."

*Recitals*

1.1 Owner is a for-hire motor carrier providing transportation service between points in the United States and Canada. User is a for-hire motor carrier providing transportation service between points in Mexico. Owner had trailer equipment in its possession and control which it desires to lend to User for use in transporting interline cargo in Mexico.

1.2 Equipment will be lent to user at the Owner's sole discretion. This Agreement is not intended to be exclusive. Owner may lend its equipment to other users and User may borrow equipment from other Owners. It is understood that neither Owner nor User make any promises regarding the number of units or frequency with which equipment will be lent under this Agreement.

*Equipment*

2.1 Equipment, from time to time, will be lent by Owner to User for use in transporting specified interline cargo between points in Mexico. Equipment is defined to include trailers, together with parts, accessories, and attachments. Interline cargo is defined as cargo moving between points in the United States or Canada, on the one hand, and, Mexico, on the other, where part of the movement will be made by Owner.

2.2 OWNER MAKES NO WARRANTY OR REPRESENTATION, EXPRESSED OR IMPLIED, AS TO THE CONDITION OR MERCHANTABILITY OF THE EQUIPMENT FOR ANY PURPOSE OR USE WHATSOEVER AND USER, BY VIRTUE OF ACCEPTING DELIVERY OF EACH UNIT OF EQUIPMENT, ACCEPTS EACH UNIT OF EQUIPMENT AT ITS OWN RISK. EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, USER'S SOLE REMEDY FOR ANY DEFECT OF ANY EQUIPMENT SHALL BE THE RETURN OF SUCH EQUIPMENT TO THE OWNER.



**2.3 USER WARRANTS AND REPRESENTS THAT IT IS IN COMPLIANCE WITH ALL APPLICABLE LAWS AND REGULATIONS AND WILL COMPLY WITH THOSE LAWS AND REGULATIONS IN CARRYING OUT THIS AGREEMENT.**

*Interchange*

**3.1 Equipment will be tendered to Owner by User at a location designated by Owner at the international boundary line. Equipment and any interline cargo on board will be inspected at point of tender, and User and Owner will execute a receipt and inspection report covering the equipment and any interline cargo at that time. User may reject the tender of the equipment. User will be responsible for returning the equipment to the location of tender, or other location agreed to in writing by the Owner and User, within \_\_\_\_\_ (\_\_\_\_\_) days of date of tender. Equipment and any interline cargo on board will be inspected at point of return. User and Owner will execute a receipt and inspection report covering the equipment and any interline cargo at that time.**

**3.2 USER WILL ASSUME EXCLUSIVE POSSESSION AND CONTROL OF THE EQUIPMENT AT TIME OF TENDER FOR ALL PURPOSES. USER WILL ASSUME ALL COST OF OPERATION AND RISK OF LOSS WHILE THE EQUIPMENT IS IN USER'S EXCLUSIVE POSSESSION AND CONTROL. THE EQUIPMENT SHALL REMAIN IN USER'S EXCLUSIVE POSSESSION AND CONTROL UNTIL TIME OF RETURN.**

**3. The receipt and inspection report shall be in the form attached. It shall be deemed to establish, for all purposes, the time at which exclusive possession and control of the equipment passes between User and Owner, and the condition of the equipment and any interline cargo at that time.**

**3.4 User's failure to return the equipment to the Owner at point of tender within \_\_\_\_\_ (\_\_\_\_) days without written authorization from Owner shall result in the imposition of a liquidated damage charge payable by the User to the Owner in the amount of \_\_\_\_\_ Dollars (\$\_\_\_\_) per day. In no event will the liquidated damage charge exceed the scheduled value of the equipment.**

*Maintenance, Repair, and Replacement*

4.1 User will be responsible for and assume the cost and expense of returning the equipment to the Owner at point of tender in the same condition as it was received, ordinary wear and tear excepted. User will bear the cost and expense of all maintenance and repair to the equipment while in its exclusive possession and control. When equipment is returned with no interline cargo on board, User will be responsible for and assume the cost and expense of returning it in clean loadable condition, all dunnage, debris, and contamination having been removed.

4.2 User will be responsible for and assume the risk for any *loss or damage* occurring to the equipment from the time of tender to the time of return. User will immediately notify Owner if the equipment is lost or damaged. If the equipment is lost, User will pay the Owner the equipment's scheduled value. A schedule will be agreed to in writing by the Owner and the User establishing the value of the equipment for this purpose. If the equipment is damaged, User may either repair the equipment or pay Owner the equipment's scheduled value. In addition, where the items of equipment lost or damaged consists of tires, tubes, chains, binders, load locks, or tarps, the User may replace those items of equipment with undamaged equipment of like quality. Owner may reject nonconforming replacement of items of equipment at time of return of the equipment.

*Indemnification*

5.1 User shall indemnify and hold Owner harmless from and against any and all claims, demands, actions, proceedings, costs, expenses (including interest, penalties, and attorneys fees), damages, and liability of any nature whatsoever, including loss or damage to equipment or any part, accessory or attachment thereto, loss, damage, or delay to interline cargo, bodily injuries, death, loss, damage, and expense to persons or property, in any manner arising out of, connected with or resulting from the possession, control, use, operation, maintenance, or return of the equipment by User or any other person from time of tender until time of return thereof.

5.2 User shall indemnify and hold Owner harmless from and against any and all liability for taxes, duties, fines, levees, penalties, assessments imposed by any jurisdiction, in any manner, arising out of, connected with or resulting from User's possession, control, use,

operation, maintenance, or return of the equipment by User or any other person from time of tender until time of return thereof.

### *Insurance*

6.1 User agrees to carry and maintain public liability, property damage, and cargo insurance for limits of \_\_\_\_\_ combined single-limit per occurrence. Owner may demand strict proof of such coverage. Owner shall have full benefit of any insurance that User may have in effect covering any shortage, loss, loss of life, injury, or damage to any person or property for which the Owner may be liable.

### *Miscellaneous*

7.1 This Agreement shall be construed and interpreted in accordance with the substantive laws of \_\_\_\_\_.

7.2 This Agreement has been translated into Spanish, English and French. However, it is understood and agreed that if there is a controversy, dispute, difference, or claim concerning the construction, interpretation, compliance of enforcement of the Agreement, the \_\_\_\_\_ language translation shall be controlling in all respects.

7.3 This Agreement may not be assigned by either the Owner or the User without the prior written consent of the other.

7.4 The Owner and User agree to submit any controversy, dispute, difference, or claim concerning the construction, interpretation, compliance, or enforcement of this Agreement to the \_\_\_\_\_ for arbitration. That arbitration shall be governed by the rules of the \_\_\_\_\_ and the arbitration award shall be binding on the Owner and the User.

7.5 The term of this Agreement shall run from the date set out below until the date it is terminated. Either the Owner or User may terminate this Agreement by providing the other party thirty (30) days written notice of such termination.

7.6 Any notice which may be given by the User or Owner shall be deemed to have been properly given if sent in writing by United States, Canada, or Mexico mail, certified mail, postage prepaid, address as follows:

User:

Owner:

_____	_____
_____	_____
_____	_____

The notice shall be effective as of the date received. The Owner or User may change its notice address by giving written notice to the other.

7.7 User will pay Owner any money owed Owner under this Agreement within \_\_\_\_\_ (\_\_\_\_\_) days of notice of Owner's charges. Payment shall be made to Owner at the address set forth in Paragraph 7.6 above.

7.8 This Agreement constitutes the entire Agreement and understanding between the parties and shall not be modified, altered, changed, or amended in any respect unless in writing signed by both the Owner and User.

DATED this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

**USER**

\_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**OWNER**

\_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_