

Insurance Times: Snarled ports expected to bring new liability mess

October 29, 2002, Vol. XXI No. 22

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Associated Press

SAN FRANCISCO — Untangling the West Coast's snarled ports inevitably will lead to another gnarly mess — sorting out who will pay for all the economic chaos caused by the 10-day shutdown.

The answers most likely will be hashed out in court by shipping lines, exporters, importers and insurers long after the resolution of the labor dispute that has marooned tons of perishable food and seasonal merchandise at 29 West Coast ports.

"This is going to create some interesting business opportunities for the legal profession and some high anxiety for the insurance industry," predicted Jack Kyser, chief economist for the Los Angeles Economic Development Corp.

Shippers are trying to shield themselves from the fallout by declaring a "force majeure" condition. The term, built into most contracts between shippers and their customers, refers to the 66-year-old Carriage of Goods Sea Act, which absolves shippers of financial liability from conditions beyond their control.

The act specifies 17 different defenses, including lockouts as well as labor strikes, said Robert Force, co-director of the Maritime Law Center at Tulane University.

Still, the shipping lines may have exposed themselves to lawsuits by deciding to lock out dockworkers who wanted to stay on the job while negotiating a new labor contract.

Businesses stuck with spoiled or delayed goods could argue that the carriers themselves "created the conditions by declaring the lockout so they are not exempt from liability," Force said.

Trucking companies, for example, usually have to pay the ports thousands of dollars a month for cargo space, and could owe shipping lines \$44 a day for each unreturned container. Already, the California Trucking Association is lobbying to get these fees waived.

Making that case in court will be difficult, though, because federal laws give employers the right to lock out workers who don't have a contract, said Peter Stergios, a New York attorney specializing in labor issues.

Shippers are more vulnerable to claims over ruined food because the companies can argue that the perishable cargo wasn't properly taken care of during the delays, said A. Robert Degen, a Philadelphia attorney specializing in maritime law.

Even under force majeure conditions, shippers have to do the best they can to preserve the goods with proper ventilation and refrigeration to avoid liability.

All told, an estimated 260 container ships and thousands of trucks and train cars are lined up outside the West Coast ports.

The Los Angeles Economic Development Corp. estimates there's about \$1.8 billion worth of goods waiting either to be shipped or unloaded at the 13 California ports affected by the shutdown. Add cargo at the 16 other ports in Washington and Oregon, and it's an even heftier sum.

The total losses also would include truckers and rail freight companies that lost time and money waiting to move cargo, and farmers who have had to discount their food or pay extra for storage.

Others doubt the economic damage is that bad.

"There is going to be an issue over what the actual damages are and how much of this is rhetoric," Stergios said.

Much of the delayed cargo has retained its value. But some food probably has rotted and other items, such as Halloween and Thanksgiving merchandise, might be rendered worthless by the shipping delays.

Dole Foods already sued to get 8.3 million tons of Ecuadorean bananas, worth \$1.7 million, off the docks in Los Angeles. With further delays expected as the ports untangle all the backed-up cargo, Dole may end up going to court again if the bananas spoil, said Dole attorney Craig De Recat.

Clothing retailers, meanwhile, may exercise contract clauses allowing them to reject late shipments. With more economic signs pointing to a sluggish holiday season, some merchants could use the shutdown to turn away clothes they no longer need and avoid post-Christmas clearance sales.

On the flip side, exporters that already got paid for now-damaged goods might refuse to issue refunds.

"It could cut both ways," said Ted Cornell, a Chicago attorney. "You are going to see a lot of suppliers and buyers looking over their contracts to see who is responsible for the bill."

Companies that chartered ships to deliver cargo may quarrel with ship owners, whose contracts usually allow for an extra charge known as "demurrage" if a vessel is returned late.

The fees can range from \$2,500 to \$15,000 per day and aren't automatically waived because of lockouts, said John Holloway, a maritime law attorney in Norfolk, Va.

Such disputes typically end up in arbitration hearings held in New York and London, maritime lawyers said.

Merchandise is so backed up now that it may take three weeks before businesses can total up their losses, said Stephen Cohen, a University of California, Berkeley, professor of regional planning.

"It's what happens when there is a big snow storm at O'Hare airport (in Chicago)," he said. "It takes a while to sort out."