

The Hearsay Portal: part 2 of 2

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Dr. Jim Giermanski (Chairman, Powers Global Holdings, Inc.) and Chris Giermanski (Director of International Operations, Transportation Services, Inc.) weigh in on the balance between facilitating trade and guaranteeing cargo identity and quantity - and what CPB needs to do to achieve just that.

Part 1 of this 2 part report ran online on Marinelink on Tuesday, July 3rd. See the first segment by clicking: <http://www.marinelink.com/news/hearsay-portal-part345968.aspx>

The Motor Carriage in Mexico and Cargo Problem (continued)

The motor carrier, rail carrier, or vessel carrier simply don't know what is in an already loaded, sealed conveyance. The carrier takes the word of the shipper about the contents from a document provided by the shipper. Now imagine the level of knowledge the U.S. Customs Brokers have about the cargo. These Brokers are third parties and also file e-manifests, through an ACE portal. The brutal fact is that both carriers and brokers do not know what is in the sealed conveyance. Furthermore, when that conveyance sits at the border on the Mexican side waiting to be released into the United States by a Mexican Customs Broker, it is subject to being entered and cargo added, removed, replaced or manipulated, especially less-than-truck (LTL) cargo. The reporting of cargo data on the e-manifest whether CBP likes it or not, is nothing more than the equivalence of "freight of all kinds (FAK)" or "said to contain" (STC), the very terms not allowed to be used in the e-manifest. Additionally, because there is no requirement of an in-conveyance container security device, the container could have been breached and cargo manipulated

by simply by-passing the container or trailer door seals which is quite easy to do and is well acknowledged and documented by the Department of Homeland Security (DHS). The bottom line is that carriers and Customs Brokers are filing hearsay information into ACE.

The Hearsay Rule

There are many definitions of hearsay and many exceptions to the hearsay rule. Probably the most common and used definition is Evidence that is offered by a witness of which they do not have direct knowledge but, rather, their testimony is based on what others have said to them . Although there is no assertion that cargo is evidence, it can be. Regardless, statements, indications, and electronic filings which offer the type and quantity of cargo carried in a conveyance are no more than statements of second or third-hand parties that make an official statement about something they have not seen or identified first-hand. These ACE filers have no “direct” knowledge of cargo. In the case of cargo identity and quantity they are merely filing information that some other entity said was in the conveyance, simply taking the word of not the actual person who supervised, and certified the cargo and quantity at loading the container at origin, but what the bill of lading says is in the conveyance. Essentially both carriers and brokers when faced with the reality of cargo accuracy agree that they file what the conveyance is alleged to contain. Perhaps, the best summary of the issue was spelled out by an experienced and respected U.S. Customs Broker who works the southern border:

These e-Manifests can be filed by anyone. They can be filed by 3rd parties, cross-border draymen/shuttle carriers, Mexican Customs Brokers and U.S. Customs Brokers by submitting these data elements in CBP's portal. They can be e-filed using a 3rd party vendor's software using their database into the CBP portal, or the U.S. Broker can use its own proprietary software and data base with ABI/ACE or, they use a 3rd party service provider. U.S. Brokers can augment their income by filing the e-Manifests because they choose to file it themselves. Others choose not to file them. The penalty for first time error/offense is \$5,000 and for repeat offenders it is \$10,000. So the risk is very high, especially if there were multiple repeat errors/offenses that are not the fault of the filer since the filer takes the word of others about the content of the e-Manifest.

Conclusion

The Automated Commercial Environment System is a good development in attempting to modernize and improve homeland security with respect to the commercial entry of foreign conveyances carrying merchandise. It facilitates trade and presumably pleases the private sector. But it does not come close, however, to guaranteeing the cargo's identity and quantity. The problem is that CPB only knows what someone (shipper) told to someone else (carrier) who told to someone else (Customs Broker) that these conveyances are said to carry something. Imagine in the case of rail and vessel carriage

where there is an additional “someone else.” Of the motor carrier, rail carrier, vessel carrier, and Customs Broker, only the shipper really knows what is in the conveyance. Just as in a trial, the judge will ordinarily not admit the “he said, she said” comments as evidence upon which verdicts or legal decisions are made. Unless CBP has the identity of the actual individual verifying the loading, and certifying the cargo and its quantity in a specific, identified conveyance at origin, it has no more than hearsay.

CBP needs to do three things. First, it must establish a reliable system of identifying cargo content with clear liability criteria for legal action against those individuals and firms who falsely certify the cargo. Second, it must require the use of container security devices to alert CBP, carriers, custom brokers, exporters and importers of breaches into the conveyance, and third, it must design an e-manifest that contains only verifiable data that can be submitted by those who are allowed to file through ACE. Only direct knowledge should be transmitted through ACE. Anything short of that relegates ACE to level of a Hearsay Portal.