

2. Aggravating Factors

- a. CES operator refuses to cooperate with Customs or acts to impede Customs activity with regard to the case.
- b. CES operator has a rising error rate which is indicative of deteriorating performance in the handling and safekeeping of cargo.

D. Restricted or Prohibited Merchandise.

If Customs has reason to believe that the merchandise which was not delivered to a CES or was removed from the CES without authorization may have been restricted or prohibited from entry, that will be considered an extraordinary aggravating factor and will result in mitigation at the high end of the mitigation range.

E. Failure to maintain records as required by regulation.

1. If a CES operator fails to maintain records as required by Customs, claims for liquidated damages not involving merchandise for violation of 19 C.F.R. 113.63(a)(3) and 19 C.F.R. 118.4 shall result.
2. If the breach resulted from clerical error, the claim may be canceled without payment.
3. If the breach resulted from negligence, the claim may be canceled upon payment of an amount between \$100 and \$250 per default, depending on the presence of aggravating or mitigating factors.
4. If the breach was intentional, no relief shall be granted.

XII. Guidelines for Cancellation of Claims Arising from the Removal of Merchandise Without Authorization From a Container Freight Station (CFS) (19 C.F.R. 19.40 ET.SEQ.) (19 C.F.R. 113.63(b)) (T.D. 99-29)

A. Assessment.

Merchandise not retained at a Container Freight Station (CFS) by the CFS operator shall be the subject of a claim for liquidated damages for violation of the provisions of 19 C.F.R. 113.63(b)(2) equal to the value of the merchandise or three times the value of the merchandise if it is restricted or prohibited or is alcoholic beverages.

- B. Mitigation of claims arising for removal or delivery of merchandise from the CFS without authorization.
1. If the CFS operator can show that the violation occurred solely as a result of Customs error, the claim for liquidated damages should be canceled without payment.
 2. If the CFS operator can show that the merchandise was never received or landed, the claim for liquidated damages should be canceled without payment.
 3. If the merchandise which was removed or delivered from the CFS without authorization could have been the subject of an informal entry, the claim for liquidated damages may be canceled upon payment of an amount equal to the duties, fees, taxes and charges that would have been due on the merchandise had entry been properly made plus an amount between \$100 and \$500, depending on the presence of aggravating or mitigating factors.
 4. If the CFS operator comes forward and discloses the violation to Customs, the claim for liquidated damages may be canceled upon payment of an amount equal to the duties, fees, taxes and charges that would have been due on the merchandise had entry been properly made, plus \$50.
 5. If the merchandise which was removed or delivered from the CFS without authorization was not designated for Customs examination and the CFS operator can show that the merchandise was entered and duties, fees, taxes and charges paid thereon, the claim for liquidated damages may be canceled upon payment of an amount between \$250 and \$2,000 depending on the presence of aggravating or mitigating factors.
 6. If the merchandise which was removed or delivered from the CFS without authorization was not designated for Customs examination and the CFS operator cannot show that the merchandise was entered and duties, fees, taxes and charges paid thereon, the claim for liquidated damages may be canceled upon payment of an amount equal to the duties, fees, taxes and charges that would have been due on the merchandise had entry been properly made plus an amount between \$300 and \$2,500 depending on the presence of aggravating or mitigating factors.
 7. If the merchandise removed or delivered from a CFS without authorization was designated for Customs examination and the

CFS operator can show that the merchandise was entered and duties, fees, taxes and charges paid thereon, the claim for liquidated damages may be canceled upon payment of an amount between \$2,500 and \$20,000 depending on the presence of aggravating or mitigating factors. In no case shall the amount upon which the claim may be canceled be lower than any chargeable costs which are incident to such examination. Conversely, the amount upon which the claim may be canceled can never exceed the value of the claim for liquidated damages.

8. If the merchandise which was removed or delivered from a CFS without authorization and was designated for Customs examination and the CFS operator cannot show that the merchandise was entered and duties, fees, taxes and charges paid thereon, the claim for liquidated damages may be canceled upon payment of an amount equal to the duties, fees, taxes and charges that would have been due on the merchandise had entry been properly made plus an amount between \$3,000 and \$25,000 depending on the presence of aggravating or mitigating factors. In no case shall the amount upon which the claim may be canceled be lower than any chargeable costs which are incident to such Customs examination. Conversely, the amount upon which the claim may be canceled can never exceed the value of the claim for liquidated damages.
9. If the CFS operator has a history of receipting for merchandise which has been removed or delivered from the CFS without authorization or allowing merchandise to be removed from the CFS without authorization, or particularly aggravating circumstances exist with regard to a claim, the Fines, Penalties and Forfeitures Officer may cancel the claim for liquidated damages upon payment of a higher amount than that authorized by these guidelines; however, the advice of HQ, ORR, Penalties Branch shall be sought to determine appropriate mitigation.
10. Theft of merchandise from the CFS. Merchandise which is stolen from the CFS shall be treated as having been removed without authorization. The CFS operator will be liable for liquidated damages and mitigation will occur in accordance with these guidelines. It should also be noted that penalties under 19 U.S.C. 1595a(b) for violation of 19 U.S.C. 1448 or 1499 may also be assessed against the individuals who steal the merchandise from a CFS. Theft of merchandise in those instances will be mitigated in accordance with guidelines articulated in Section III.B.10. of the Guidelines for Delivery of Cargo Without Customs Authorization in the Vessel section of this Handbook.

C. Mitigating and Aggravating Factors.

1. Mitigating Factors

- a. CFS operator inexperienced in the handling of cargo.
- b. CFS operator has a general good performance and a low error rate in the handling of cargo.
- c. CFS operator demonstrates remedial action has been taken to prevent future claims.

2. Aggravating Factors

- a. CFS operator refuses to cooperate with Customs or acts to impede Customs activity with regard to the case.
- b. CFS operator has a rising error rate which is indicative of deteriorating performance in the handling and safekeeping of cargo.

D. Restricted or Prohibited Merchandise.

If Customs has reason to believe that the merchandise which was removed from the CFS without authorization may have been restricted or prohibited from entry, that will be considered an extraordinary aggravating factor and will result in mitigation at the high end of the mitigation range.

XIII. Claims for Liquidated Damages Assessed Against a Bonded Party for Failure to Notify Customs of the Presence of Unentered Merchandise (T.D. 99-29)

A. Assessment.

Any merchandise or baggage that is taken into custody from an arriving carrier by any party under a Customs-authorized permit to transfer or in-bond entry may remain in the custody of that party for 15 calendar days after receipt under such permit to transfer or 15 calendar days after arrival at the port of destination. No later than 20 calendar days after receipt under the permit to transfer or 20 calendar days after arrival under bond at the port of destination, the party must notify Customs of any such merchandise or baggage for which entry has not been made. Such notification must be provided in writing or by any appropriate Customs-authorized electronic data interchange system. If the party fails to notify Customs of the unentered merchandise or baggage in the allotted time, he may be liable for the payment of liquidated damages equal to \$1,000 per bill of lading for which notification is not given for violation of the provisions