IN TRANSIT

Transportation Loss Prevention and Security Association — Autumn 2002

CONTENTS

Transportation Loss Prevention and Security Association

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A SMASH HIT !

TLP & SA 2003 ANNUAL CONFERENCE OPENS IN RENO, NEVADA
APRIL 6 THROUGH APRIL 9, 2003
@ John Ascuaga's Nugget Hotel Resort & Casino
1100 Nugget Avenue
Sparks, Nevada

The advance buzz among the people who know is that this year's Conference has it all -
– GREAT LOCATION.....IMPORTANT TOPICS.....KNOWLEDGEABLE & EXCITING SPEAKERS.....MORE EXHIBITS THAN LAST YEAR..... EXCELLENT NETWORKING OPPORTUNITIES.....& A CHANCE TO SAVE BIG BUCKS.

WHAT MORE CAN YOU ASK?

PUT THE DATE ON YOUR CALENDAR.

You will receive your Program information soon. Register as soon as you get it and we will know to expect you. The world of Transportation is ever changing and we must change with it.

SEE YOU IN RENO !!

This will again be a joint venture with the TCPC. Everyone from last year's conference gained something (some claims were even settled at the seminar). We look forward to your attendance at this year's joint conference.
If you know of a vendor who may want to display their wares, contact Ed Loughman @ (201) 343-1652. Every vendor at last year's conference received an order from one of the attendees. Tell them to reserve space for their Exhibit by March 21, 2003.

A VIEW FROM THE EXECUTIVE DIRECTOR

There are disasters and there are disasters. It all depends on your point of view. As I look out my window on the ever changed New York skyline, it is hard to believe that over a year has past since such a monumental disaster befell our country. No matter how many times people say that some good came from that disaster, there is no getting away from the fear and horror that was visited upon unsuspecting innocent people who were merely attempting to lead their lives. The country came together...there was an out pouring of aid, assistance and sympathy...we began a war against terror. But our country was changed forever.

As we try to emerge from the September 11th tragedy, we find that our business world continues to have problems of its own. Yet we all still have to provide for our families and function in our jobs. If the closing of APA was unexpected, the bankruptcy of Consolidated Freightways, while not a shock was more than unsettling. Hopefully that new spirit of cooperation spawned by September 11th will spread to our business community and we will all try harder to see the other person's point of view on such things as claims issues, negotiating contracts and just in our everyday relationships with our business "partners".

It was interesting that in a recent speech by the Assistant Secretary for Policy of the U.S. D.O.T., which speech is discussed in detail in another article, the Secretary observed that shippers should consider paying reasonably higher freight rates based on the savings that shippers have received through deregulation in order to keep the trucking industry viable. Such cooperation would go a long way to assist the transportation industry and to promote a business atmosphere that would boost our sagging economy.

While we cannot erase September 11th, we can show the world that our country remains strong and thriving. Each one of us has an increased responsibility to contribute to this goal.

TLP&SA welcomes Edward Loughman as the Assistant to our Executive Director

Ed has been in transportation for 48 years, most recently as the Senior Claims Adjudicator for Gilbert East Corp. He is also a Past President of the Northeastern Motor Carrier Claim & Security Conference. He will be available to our members on Tuesdays, Wednesdays & Thursdays from 10:00 A.M. until 2:00 P.M. EST to assist in any way he can. He can be reached at (201) 343-1652. Call Ed or e-mail him @ **ELoughman@nakblaw.com** with your problem and he will get an answer for you.

FEDERAL D.O.T. OFFICIAL SPEAKS ON U.S. TRANSPORTATION POLICY

Emil Frankel, Assistant Secretary for Policy of the United States Department of Transportation discussed the status of the next Surface Transportation Act in a speech delivered on September 12, 2002 at the Voorhees Transportation Center on the campus of Rutgers University in New Brunswick, New Jersey.

Mr. Frankel was appointed Assistant Secretary for Transportation Policy of the United States Department of Transportation in March of 2002. From 1991 - 1995, he served as Commissioner of the Connecticut Department of Transportation. Mr. Frankel was a Fulbright Scholar at Manchester University in the United Kingdom and received his law degree from Harvard Law School.

Secretary Frankel's presentation was wide ranging covering several of the administration's proposals for the Surface Transportation Act. He did comment on the recent bankruptcy's of Consolidated Freightways and APA Transport. Of importance to the trucking industry, Mr. Frankel observed that shippers must understand that carriers have to make a reasonable profit to survive and that shippers should consider sharing the savings obtained from deregulation with carriers through increased freight rates. While Mr. Frankel indicated that funding for the new Surface Transportation Act would be a problem due to the economy, he stated that the administration is working hard with Congress to prioritize the nation's needs, especially in light of the new security concerns brought about by the September 11th tragedy.

In a question and answer session following Mr. Frankel's presentation, an audience member suggested that the administration should consider a way to place more freight on the rails in order to cut down on truck traffic. Mr. Frankel quickly replied that while freight carriage by truck has increased and will increase greatly in the next 20 years, there is no substitute for the trucking industry when it comes to fulfilling 'just in time' requirements and making deliveries to specific destinations. Mr. Frankel further observed that while it would be beneficial to coordinate rail and truck carriage, there will always be a great need for a strong trucking industry and that such a strong industry is supported by the administration.

As members are aware, TLP & SA is closely involved with the Voorhees Transportation Center at Rutgers and your Executive Director serves on the Voorhees Advisory

Board. At a dinner after Mr. Frankel's presentation, I had an opportunity to speak with him concerning various issues of concern to our Association. Secretary Frankel was interested in the educational work being done by our Association since he was aware that ATA was not actively pursuing education in the area of claims and security. Mr. Frankel invited us to submit any policy ideas and concepts to him if we feel the U.S. D.O.T. might be interested.

BUSINESS and the LAW

All too frequently in the transportation field business is dependent on the law or business has direct legal consequences. The truth of this statement is demonstrated clearly in two areas: TARIFFS and FREIGHT CHARGES. Tariffs provide the rules and freight charges provide the money. What else is there?
The two following articles will hopefully provide some answers.

TARIFFS - AN OLD CONCEPT THAT'S SHINY NEW AGAIN

Tariffs have been around since the beginning of surface carrier regulation. The tariff documents had to be in required form and filed with the Interstate Commerce Commission. It was only during those tumultuous times of undercharge claims that most of us found out that those formal binding tariffs were strewn in piles across darkened rooms at the old ICC building.

With the sun-setting of the ICC and with the enactment of the Interstate Commerce Commission Termination Act, one might think that tariffs have become dinosaur documents. But as the French say, "au contraire". Tariffs may be more important today than they ever were.

Tariffs had been defined as the charges, rules and regulations and contractual provisions of a carrier filed with the appropriate regulatory agency such as the former ICC or the former Civil Aeronautics Board. Subsequent to the enactment of TIRRA (The Trucking Industry Regulatory Reform Act of 1994) and the promulgation of the ICC Termination Act of 1995 (ICCTA) most motor carriers, other than those transporting household goods, were no longer required to file tariffs with a federal administration agency. But such carriers were still required to provide to a shipper, on request, a written or electronic copy of the rate, classification, rules and practices upon which any rate applicable to the shipment or agreed upon between the shipper and carrier is based (49 USC sec. 13710 (a)(1)(1995).

Where a carrier maintained such information which was available by statute upon request of the shipper, but the shipper failed to request the information, the shipper was held to have constructive notice of the terms of the tariff. Therefore, tariffs today can play a significant role in clarifying the relationship between shippers and carriers. Instead of hiding information, which some carriers had been accused of in the past, carriers can now use tariffs to provide shippers with specific information so that shippers can better understand the conditions under which their goods are carried.

We have been recommending for years that carriers "*bite the bullet*" and re-write their tariffs in *dare we say,* "Plain English"! Many lawsuits can be avoided if both parties understand the rules. Go back over some of your claims, we suggest that many of them would resolve themselves if a straight forward tariff applied which spelled out the rights and responsibilities of the parties.

For example, many carriers have a variation of the "Used Machinery" tariff. Does that apply to rebuilt equipment? Reconditioned equipment? Refurbished equipment? You get the point. If your tariff limited liability to any equipment other than brand new or specifically limited liability for rebuilt, reconditioned or refurbished equipment, your claims life and your relationship with your customer would be made easier.

In the case of third party billing, which has become so fact sensitive, the parties would be better served if the carrier clearly stated in its tariff that it relied on the credit of the shipper as well as the credit of the third party. Rarely do you find a COD tariff that does not create more problems than it solves.

Therefore, since the carriers now have a golden opportunity to redraft tariffs without having to go through the long and difficult regulatory filing and approval process, and in view of the fact that shippers have the right to obtain and review these tariffs merely upon request, every carrier should explore the possibility of reviewing and rewriting their tariffs in order to avoid costly fights and misunderstandings with their valued customers.

WHO HAS TO PAY MY FREIGHT CHARGES?

"I don't work for nothing!" "I did the work. Now I want to get paid!" " I thought the law was that both the shipper and the consignee were liable for freight charges." "The shipper told me to bill the third party, I don't care if they

went bankrupt, the shipper still owes me my money."

If you had been listening in on my telephone conversations lately, that is what you might hear. Even though the "Undercharge" controversy has been dealt with by statute, lingering fallout continues to spread over the transportation industry. Prior to Congress coming to grips with millions of dollars of undercharge claims brought by bankruptcy trustees, the courts attempted to mold and fashion the existing law to protect shippers where possible. In addition, unregulated third party intermediaries were taking advantage of deregulation and controlling much of the nations freight. It is not surprising that these two phenomenon would create havoc with legitimate freight charges. The ultimate issues more likely than not is: Who will take the loss?

To start off with, a carrier has, under federal law, two sources from which to seek payment of shipping charges. The first source is the consignor, the one who shipped the goods and who is generally primarily liable, and the second is the one who received the goods, the consignee. They both as a matter of law, are liable for shipping charges. See 49 U.S.C. ¶ 13706.

A short description of the development of the Interstate Commerce Act is appropriate at this point. Since the adoption of the Interstate Commerce Act on February 4, 1887, it was considered a matter of public policy that the Interstate Commerce Act demanded that the carrier receive full payment in every case. The case of Pittsburgh & c. Ry. Co. v. Fink, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919), established the rule that regardless of contract, in equitable principles, a consignee who accepts delivery cannot avoid liability for freight charges. Further, see L. & N. R.R. v. Central Iron Co., 265 U.S. 59, 44 S.Ct. 441, 68 L.Ed. 900 (1924). In a large number of cases subsequent thereto the courts consistently stated that, by the Interstate Commerce Act, Congress intended to impose absolute liability upon a consignee. Beginning with the case of Missouri Pacific Railroad Co. v. National Milling Co., 276 F.Supp. 367 (D.N.J.1967), aff'd 409 F.2d 882 (3d Cir. 1969), principles of estoppel were applied to bar a carrier from imposing a double payment upon a consignee that accepted delivery of a shipment under a uniform straight bill of lading marked "freight prepaid," and then reimbursing the consignor for the full amount of the freight charges in accordance with the separate agreement. By marking the bill of lading "prepaid," the carrier was held to have represented satisfaction with freight charges upon which the consignee reasonably relied in paying the same amount to the consignor. The leading case is Consolidated Freightway Corp. of Del. v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971).

Inasmuch as the consignee of goods is liable as a matter of law for payment of the freight charges for the goods delivered and accepted, the consignee must prove the facts sufficient to create as equitable estoppel to avoid liability. Hilt Truck Lines, Inc. v. House of Wines, Inc. 299 N.W. 2d 767 (1980). Herein lies the rub, to use a literary allusion. Many of these cases come down to an interpretation of the facts rather than a clear statement of the law. However, being aware of the situation, a knowledgeable carrier can take various steps in advance to establish facts which will protect its freight charges. A clear bill of lading: a specific tariff provision; and an accurate understanding by or among the parties will go a long way to assist the carrier in collecting proper freight charges for goods delivered on time and without exception.

As indicated above, the term "prepaid" generally means that the carrier is accepting goods with the expectation that the consignor will be responsible for the freight charges. If Section 7 of the bill of lading is signed it generally means that the consignor/shipper will not be responsible for the freight charge, but that the carrier must look to the consignee for payment. The same if freight charges are "collect". If these terms do not appear on the bill, it is assumed that the shipment is "prepaid". An unanswered question is what happens if inadvertently both statements, "prepaid" and Section 7 appear on the bill. Do they cancel each other out, and, if so, who pays?

So how can a carrier avoid these difficult and costly problems? First of all, all carriers should have a clear and specific tariff provision concerning freight charges and who is responsible. Such a tariff initially establishes the relationship among the parties and will be the touchstone for an examination by a court. The carrier should indicate on whose credit it relied, the shipper, the consignee or a third party. And the carrier should specify what happens if conflicting terms appear on the bill and the carrier inadvertently accepts such a bill. Anticipation of these potential problems is key to a successful outcome. (See the importance of tariffs generally in the tariff article in this issue).

Secondly, bills of lading should be periodically reviewed for errors with regard to freight payment i.e. proper payment terms; failure to specify "prepaid" or "collect"; inconsistent payment terms. Customers should then be contacted and assisted in the use of proper transportation documents.

Finally, if a "bill to" party is to be listed on the bill of lading, make sure it is clear whether the carrier is relying on the third party's credit or on the credit of the shipper or

the carrier and put that information in writing as your understanding regarding the ultimate payment of freight charges. Do not leave agreements unsubstantiated as they will then be up to the fact finding of a court or a jury which is unpredictable at best.

If a carrier delivers the goods on time and without exception, that carrier deserves to be paid. Therefore, carriers should do everything in their power to make sure that freight charges will be paid by the party who is responsible. Hopefully, these tips will prevent the loss of some of your freight charges. None of us can afford to work for nothing!

Security

One of the many problems in our industry is the acceptance of the information on a potential employee's application. It is of utmost importance that your Security Department check, not only his/her previous employer(s), but also to run a check on him/her through the authorities.

MISCELLANEOUS

Another change - business as usual. Consolidated Freightways declared bankruptcy under Chapter 11 on September 2, 2002 (Labor Day). L/T/L business for its competitors is booming. Our transportation industry has had numerous changes in the past 25 years, yet everything seems to stay the same. The ICC is gone. The DOT is here. The National Freight Claim & Security Council of the ATA is gone, but the ***Transportation Loss Prevention and Security Association*** is here. We are here to help our members with claims problems, security problems, insurance problems, legal and legislative problems and to update you on any changes in our industry.

New Business -

When taking on a new account (shipper), be certain that your company checks with your Claims Department before they sign any contract. It is well and good to have your sales people gain new business, but your claims and insurance people should have an input as to how the account is going to be handled insofar as claims are concerned. In fact, your claims and insurance departments should create the rudiments of a general contract (including your tariffs), for your company to follow.

To emphasize this to your corporate offices, here is a proven formula that shows how much your company needs to earn in revenue in order to be able to afford to pay a claim: Deduct your Operating Ratio (O/R) from 100. Divide the amount of the claim by that answer. e.g. O/R = 95, deducted from 100 = .05. If you have a $500 claim, you need to generate $10,000 in claims free revenue in order to afford to pay that claim.

Visit our Website

(click below)

www.tlpsa.org

This is another 'TOOL' available to our members. We will be updating pertinent information periodically. Our Website will be up and running as of November, 2002.

All members will receive a password for secure information.

F. Y. I.

Did you know that your TLP&SA annual dues are less than $1.25 per day?

CCPAC will hold its certification exam on 11/2/02. Please contact CCPAC at PO Box 441110 in Fort Washington, MD 20749-1110, or call them at (301) 292-1988 / FAX (301) 292-1787).

Visit their website by clicking below:

The Certified Claims Professional Accreditation Council, Inc.

"Q & A"

Write in, e-mail us, FAX us or call us with your QUESTION and our staff will respond. Our first question came to us from a judge who needed to know -

"What is a 'PRO'?" We told the court; "A PRO is a waybill (a freight bill). The word PRO means a progressive number, it starts at '1' and ends at ad infinitum."

A quote worth remembering:

"It is not the will to win that counts. Everyone has the will to win. It is the will to prepare to win that counts."

Mr. Black, Attorney at Law

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