In Transit

Transportation Loss Prevention & Security Association

Summer 2008

In This Issue...

Transportation Loss Prevention and Security Association

155 Polifly Road
Hackensack, NJ 07601

201-343-5001
201-343-5181 FAX

William Bierman
Executive Director

wbierman@nakblaw.com
www.TLPSA.org

OUT OF GAS!

Check Conference pictures on pages 8 - 11

Look Inside!

See Page 18 for
Carrier Claims Survey and Chart

WORLD CLASS

By: William D. Bierman Esq. - EXECUTIVE DIRECTOR TLP&SA

I could easily say that our Joint Conference at the Catamaran Resort Hotel in April was "World Class". Based on the responses from attendees, we received high marks for education; speakers; exhibitors; hospitality; and events. Even our Reception Cruise provided an experience on the high seas. But the fact is that the transportation industry like most other industries in our country has become global.

During our Conference, I heard people speaking in Spanish, Russian, German, and French as well as English. Dr. Elena Melanich came to us all the way from Moscow to present her unique ideas on global security. We are immersed in shipping to and from foreign ports and we are highly concerned with the security that comes along with this international commerce. Like it or not, we are all players on the world stage.

Therefore, it is more important than ever for companies to have personnel who understand how to integrate transportation loss prevention and security with this new emphasis on international commerce. Some of you may have read my observation in our recent Conference Program entitled "Penny Wise and Pound Foolish" wherein I dealt with the compelling reasons for investing in education for transportation professionals. I advocated the position that it was penny wise and pound foolish for any company to save the cost of education at the risk of exposing themselves to claims and breaches of security that could have been prevented by trained employees.

Our Conference had Sessions and Workshops which explored the cutting edge issues of global transportation. We had the trade press give an overview of the issues presented by worldwide transportation including problems and predictions. We had an entire Workshop on International Trade focusing on compliance with new rules and regulations governing import and export of goods. Our Panels discussed recent legal cases which demonstrated how the courts in the United States viewed these global questions. Moreover, we had hands on experts who instructed us on seals, security, and cargo theft.

Where else could company professionals receive first hand information from representatives of TSA, the Federal Motor Carrier Administration and the CEO of FedEx National, Doug Duncan? It seems to me that an investment in a Conference such as ours pays huge dividends to any company as I concluded in my editorial in our Conference Program:

We suggest the "WORTH" of our Conference is measured by what you bring home: (1) Education; (2) Cutting edge knowledge of what is happening in our industry today; (3) Legal insight on transportation issues; (4) The acquaintance of people who can assist you tomorrow; (5) Exposure to Exhibitors whose services you need. In today's economy our Conference guarantees you an immediate profit and an excellent investment. What more could you and your companies want?

By any measure our Conference was "World Class" and produced world class attendees. Share this article with your company and encourage them not to be "Penny Wise and Pound Foolish".

BASF Corporation v. Norfolk Southern Railway Company, S.D.N.Y. 07-CV-9662 (March 10, 2008).

By: Barry Gutterman -
Barry N. Gutterman & Associates, P.C. – New York City, NY

A shipment of pesticides was loaded onto an ocean-going container in St. Louis, Missouri, with delivery to Antwerp, Belgium. The plaintiff-shipper hired the ocean carrier for the transport of the goods and they subcontracted the land carriage to the railroad for transport from St. Louis to Norfolk, Virginia. While in transport, the shipment derailed and the shipper sued the rail carrier for damages of $275,000.

The district court, in BASF v. Norfolk Southern Railway Company, S.D.N.Y. 04-CV-9662 (March 10, 2008), granted the rail carrier's motion for summary judgment, holding that pursuant to the rail circular, the suit was time barred under the one-year limitation period.

The issue of particular interest in the court's grant of summary judgment was the discussion of the mail-box rule. The rail carrier sent a letter of declination to the shipper but the shipper denied receiving the letter. Suit was filed six months after the one-year limitation period. The ocean bill of lading applied to the rail carrier as subcontractor, and the terms and conditions for the shipment were governed by a price quote between the ocean carrier and rail carrier.

The court held that under the law in the Second Circuit, the presumption of receipt of the declination letter by the shipper was not rebutted by plaintiff's affidavits describing how they processed incoming mail. Instead, the court held that the rail carrier's affidavits established the proper office procedure in the regular course of business for the mailing of the declination letter, and that the plaintiff was presumed to have received the declination letter in a timely fashion.

Decisions of particular importance relate to the continuing saga resulting from the Second Circuit Court's decision in Sompo Japan of America v. Union Pacific Railroad Company, reported at 456 F. 3d 54 (2006).

In this case, the Second Circuit analyzed COGSA, the Carmack Amendment, and the Staggers Act to determine which law applied for a shipment of tractors transported from Tokyo, Japan to Swanee, Georgia. The shipment derailed in Texas while being transported by Union Pacific. Liability was not in dispute and Union Pacific obtained partial summary judgment vis-à-vis the ocean bill of lading on the $500 per package limitation. However, the Second Circuit reversed, and held that; (1) Carmack governed, not COGSA on a through ocean bill of lading; (2) distinguished the decision by the U.S. Supreme Court in Norfolk Southern Railway Company v. Kirby, 543 U.S. 14, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004), holding that a Carmack issue was not raised in Kirby; (3) that Union Pacific was not entitled to the COGSA package limitation; and (4) remanded the case to the District Court to determine if the railroad offered the shipper an opportunity, consistent with Staggers, to receive full Carmack liability coverage.

Judge McMahon, in a decision reported at 2007 U.S. Dist Lexis 58162 (S.D.N.Y. 2007), held that the Second Circuit's decision that Carmack governed Union Pacific's liability was the law of the case and that the railroad did not offer Carmack liability in its exempt circular for international shipments.

Union Pacific filed a notice of appeal and its appellate brief with the Second Circuit in the above-captioned case, as well as its notice of appeal (and its appellate brief) from a decision by Judge Batts in Sompo Japan Insurance Company of America v. Union Pacific Railroad Company, 02 Civ. 9523 (S.D.N.Y. 2007) which involved the same parties and Union Pacific's exempt railroad circular, but with a different ocean bill of lading that contained the same $500 package limitation. Judge Batts followed the same reasoning as in Judge McMahon's decision, holding that Carmack governed on a through ocean bill of lading, and that the railroad did not offer full Carmack coverage under its exempt circular.

In view of the decision by the U.S. Supreme Court in Kirby that a domestic rail carrier's liability is controlled by a multimodal ocean through bill of lading and is governed by COGSA, as well as case law in eight circuits (whereas the Second Circuit in Sompo to the contrary holds that Carmack governs), if the appeals are decided unfavorably to the railroad, a petition for certiorari will be filed with the U.S. Supreme Court. The same issue in Sompo was involved in Altadis USA, Inc., v. Sea Star Line et. al., 458 F. 3d 1288 (11th Cir. 2006), wherein the Eleventh Circuit held that the COGSA limitation applied because no separate bill of lading was issued for the inland leg of the transport. Certiorari by the U.S. Supreme Court was granted but the case settled before the briefing was completed.

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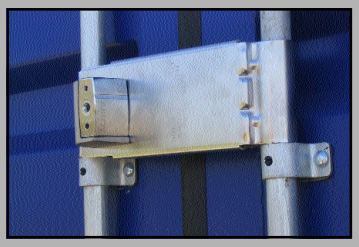

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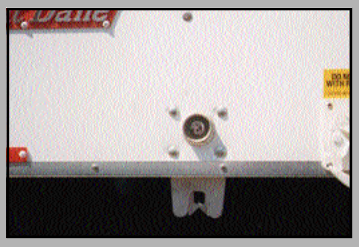

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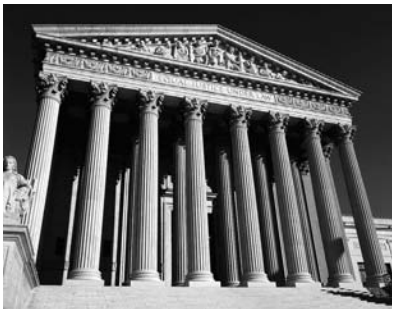

Recent Court Cases

as analyzed by the Conference of Freight Counsel

Wesley S. Chused, Chairman • William D. Bierman, Vice Chairman

1. Rowe v. New Hampshire Motor Transport Association, 128 S. Ct. 989 (2008) (preemption).

In Rowe the United States Supreme Court ruled that the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. §14501(c), preempted a State of Maine statute which, inter alia, (1) specified that state-licensed tobacco shippers must utilize delivery companies that provide a recipient-verification service confirming that the buyer is of legal age and (2) adds, in prohibiting unlicensed tobacco shipments into the State, that a person is deemed to know that a package contains tobacco if it is marked as originating from a Maine-licensed tobacco retailer or if it is received from someone whose name appears on an official list of unlicensed tobacco retailers distributed to package delivery companies. The Court followed its 1994 decision in Morales v. Trans World Airlines, Inc., in which it interpreted similar language in the preemption provisions of the Airline Deregulation Act of 1978. Essentially, the Court found that the Maine statute affected the price route or service of motor carriers in violation of §14501(c).

2. REI Transport, Inc. v. C.H. Robinson Worldwide, Inc., 519 F.3d 693 (7th Cir. 2008) (broker claims).

Defendant C.H. Robinson, a broker, had coordinated the shipment of DVD players from a Circuit City warehouse in California, via rail, to Illinois and hired plaintiff REI Transport to handle the final (Dupo, IL to Marion, IL) leg of the trip. Through no fault of REI, the shipment arrived short approximately $85,000 worth of DVD players. Robinson paid Circuit City, and Circuit City assigned its right to recover to Robinson. Robinson then withheld charges from what it owed REI. This led REI to sue Robinson alleging conversion, unjust enrichment and breach of contract. Robinson counterclaimed for loss and damage on the DVD shipment under the Carmack Amendment for $4,197 more than what REI was looking for. The District Court agreed with Robinson, dismissed REI's claims, and entered judgment for Robinson and against REI for the $4,197 difference. The Seventh Circuit affirmed. It noted that under Robinson's agreement with REI, Robinson could withhold payment to satisfy cargo claims or shortages. It noted that although the Carmack Amendment generally preempts state law causes of action against carriers, it does not preempt all claims by a carrier against a shipper for non-payment of freight bills, but REI's claim failed nonetheless because Robinson was justified in withholding payment. The Court reviewed the preemptive sweep of the Carmack Amendment and found that although it did not extend to REI's breach of contract claim against Robinson, Robinson had a valid counterclaim and was able to establish a prima facie case of liability on the part of REI even though REI was not technically at fault for the damage. The Court deemed circumstantial evidence sufficient for Robinson to have established its prima facie case under the Carmack Amendment.

3. Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co., 513 F.3d 949 (9th Cir. 2008) (freight charge liability).

Plaintiff motor carrier, Oak Harbor, sued the defendant shipper, Sears, and its broker, NLC, to recover nearly a half a million dollars for transportation of Sears' freight. For many years Oak Harbor had been transporting Sears' freight and beginning in1992 Sears used NLC to broker certain of its shipments. In January 1992 Oak Harbor and NLC signed an agreement providing that "Shipper" agreed to pay carrier within a predetermined time from the date of receipt of a freight bill regardless of whether or not the broker had been paid for the transportation. Oak Harbor then handled numerous shipments using uniform straight bills of lading which identified Sears as "Consignee" and were marked "collect". The billing pattern was that Oak Harbor would send NLC invoices, NLC would then audit the invoices and bill Sears on a weekly basis for the freight charges, Sears would then pay NLC about five days after receiving the bills, and NLC would then pay Oak Harbor with Sears funds about twenty-five days after it received Oak Harbor's invoice. In 2004 Sears terminated NLC's services, at which time Oak Harbor was owed more than $400,000 in freight charges. After not getting paid by NLC, Oak Harbor sought payment directly from Sears, but by that time Sears had already paid $227,202 of the amount demanded to NLC for freight charges invoiced by Oak Harbor. On cross motions for summary judgment, the district court had ruled that NLC and Sears were jointly and severally liable to Oak Harbor for $426,417 in freight charges under the contract and the bills of lading. The district court found that equitable estoppel did not bar Sears' liability to Oak Harbor for the $227,202 it had already paid NLC.

The Ninth Circuit affirmed, ruling that the bill of lading is the basic transportation contract between shipper/consignor and carrier, the terms and conditions of which bind the shipper and all connecting carriers. Since Sears was the shipper/consignor it was liable for the freight charges on the outbound bills of lading. Similarly, Sears was liable for the freight charges on the inbound shipments under the bills of lading. The Court rejected Sears' equitable estoppel argument that it should not be required to pay twice, a question of first impression in the Ninth Circuit. The Court recognized decisions in the Fourth, Fifth and Eleventh Circuits holding that a shipper should bear the risk when it chooses to pay for freight charges through a broker rather than directly to the carrier. It concluded that the shipper, not the carrier, is in the best position to avoid liability for double payment. Since Sears generated the bills of lading and failed to execute the "non-recourse" provision therein, the

Court affirmed the lower court judgment holding Sears liable for Oak Harbor's unpaid freight charges.

4. Sompo Japan Insurance, Inc. v. Nippon Cargo Airlines Company Limited, 2008 U.S. App. LEXIS 7834 (7th Cir. 2008) (limitation of liability).

In this subrogation action, plaintiff Sompo sought to recover $271,304 in damage to a shipment of computer equipment transported from Japan to Indiana. Sompo sued Yusen Air and Sea Service Company ("Yusen"), Nippon Cargo Airlines ("NCA") and Pace Air Freight ("Pace") and settled with Yusen and Pace for $8,500 and $100,000 respectively. The case went to trial against NCA, who claimed that since its liability under the Warsaw Convention, as amended by Montreal Protocol No.4, was limited to $74,450, after setting off of the $108,500 Sompo had received from Pace and Yusen, NCA's liability to Sompo, therefore, was $0. On cross-motions for summary judgment the district court rejected NCA's argument, applied Illinois state law as to setoff, and ruled that the $100,000 Sompo previously received from Pace and Yusen should be applied to the amount of Sompo's actual loss ($271,304), reducing the loss to $162,804, and then limiting NCA's liability under Warsaw to $74,450. NCA appealed and Sompo cross-appealed on the issue of prejudgment interest.

The Seventh Circuit affirmed, following an analysis of the history and purpose of the Warsaw Convention, affirmed the fact that NCA had a right to setoff under Illinois' joint tortfeasor law that was not preempted by Warsaw, distinguished Carmack Amendment preemption (of state joint tortfeasor liability) and Warsaw Convention language, and concluded that the district court had properly applied the setoff. The Court rejected NCA's argument that the plain meaning of the setoff statute required the reduction of Sompo's judgment to $0 as "an absurd result," and concluded that Sompo received no unfair windfall by having recovered $108,500 from Pace and NCA, given the size of its actual loss. "Our interpretation of the setoff rule in no way increases the air carrier's risk of being subjected to unpredictable or catastrophic damages." The Court denied Sompo's request for prejudgment interest.

5. BASF Corporation v. Norfolk Southern Railway Company, 2008 U.S. Dist. LEXIS 19918 (S.D.N.Y. 2008) (suit limitation).

Following a train derailment, plaintiff sued NS for $275,000 in cargo damage. The shipment originated in St. Louis and was destined for delivery in Antwerp, Belgium. NS was the subcontractor for the land portion of the trip, from St. Louis to Norfolk, Virginia, and an NYK ocean bill of lading would have been issued had there been no derailment and has the goods had arrived in Norfolk, Virginia. The district court granted NS's motion for summary judgment, holding that pursuant to NS's Circular, the suit was time-barred under the Himalaya Clause and COGSA. The price quote between NYK, the ocean carrier, and NS referred to the NS Circular and its one-year limit to file suit from the date of declinations. Of particular importance is the holding on the presumption that plaintiff received NS's declination letter when NS mailed the letter, and that NS's affidavits provided proof of proper mailing of the letter.

6. Armstrong v. North Alabama Moving & Storage, Inc., 533 F. Supp. 2d 1157 (N.D. Ala. 2008) (complete preemption).

The defendant household goods motor carrier had moved the plaintiffs from New York to Alabama and plaintiffs filed suit in Alabama state court to recover damage to their property. Defendant removed the case to federal court and moved to dismiss all of plaintiffs' claims (state law causes of action) on grounds of Carmack Amendment preemption. The court stopped short of granting the motion because it questioned the propriety of the notice of removal since the complaint did not identify the amount of damages claimed. While the court recognized that under the Carmack Amendment the doctrine of complete preemption is applicable, it was concerned because of the Carmack Amendment's provisions that suit also could be brought in state court, even though removable if the amount in controversy for each receipt or bill of lading exceeds $10,000. Consequently, the court ordered the defendant to show cause why the case should not be remanded for lack of jurisdiction.

7. Advance Food Company v. Large Car Logistics LLC, 2007 U.S. Dist. LEXIS 94693 (prima facie case).

Plaintiff, a shipper of meat products, sued the defendant motor carrier, Mike's Loading Service, Inc., for damage to a shipment of meat products it shipped from Oklahoma to Florida which was rejected because the product exceeded the maximum allowed temperature at destination. In support of its motion for summary judgment, plaintiff submitted the affidavit of its risk manager, asserting that the product was in good condition when given to the motor carrier. However, at his deposition, the risk manager had testified that he was not present when the product was loaded and therefore lacked personal knowledge of the condition of the product at origin. Since the risk manager was not qualified and had no personal knowledge, the court ruled that the plaintiff had failed to establish a prima facie case and denied its motion for summary judgment.

8. A&P Trucking, Inc. v. MKM Transportation Services, Inc., 2008 Conn. Super. LEXIS 506 (Conn. 2008) (broker liability).

Plaintiff A&P Trucking, a motor carrier, was asked by one of its shipper/customers to take a shipment of machinery to Florida. A&P then hired defendant MKM, a broker, to move the load. Plaintiff A&P claimed that the agent of the defendant who was transporting the machinery caused damage, as a result of which plaintiff became liable to the shipper. After the shipper's insurance company rejected its claim because its insurance covered only the shipper's own vehicles, under pressure from the shipper, plaintiff A&P agreed to pay $35,000 for the damage. In doing so, it did not obtain an assignment of any right that the shipper might have had against the underlying motor carrier. Following a bench trial, the court found there was insufficient credible evidence to support plaintiff's contention that defendant should not have hired the motor carrier selected due to prior bad experiences of plaintiff. Instead, the court found that the oral contract between plaintiff and defendant was that defendant would find a ready, willing and able trucker to handle the machinery shipment, which it did. The court further found there was

no evidence to support a principal-agent relationship between the defendant broker and the motor carrier, an independent contractor. The court also rejected plaintiff's common law indemnification claim, finding no evidence that plaintiff was a tortfeasor, a prerequisite to succeed on such a claim, but that the only party who could be liable was the motor carrier, who was not a party to the action.

9. Marx Transport, Inc. v. Air Express International Corporation, 2008 Ill. App. LEXIS 131 (Ill. 2008) (broker freight charge liability).

Plaintiff Marx Transport, a motor carrier, filed suit in state court against a shipper, Corning, Inc., to collect $50,070 in freight charges on shipments transported from Kentucky to two airports for overseas delivery. The transportation was arranged by a broker, North American Expediting, against whom Marx obtained a default judgment. The trial court found in favor of the defendant shipper and Marx appealed. The appellate court affirmed the trial court's judgment on the basis that neither the shipper, Corning, nor its freight forwarder, Danzas, hired plaintiff Marx to perform the transportation, and Marx had never submitted an invoice to Corning or to its freight forwarder. Corning and Danzas furnished evidence showing they had paid the broker, North American, for the transportation services. The Appellate Court, after reviewing the bill of lading document, noted that its concern was not over the bill of lading terms and conditions but rather over the fact that the defendant shipper would have to "repay for services for which they have already paid North American." The Court further noted that the consignor generally remains primarily liable unless the bill of lading or a course of dealing provides otherwise, but went on to find that the bills of lading were ambiguous in that they did not indicate how much Marx was to be paid for its services or who would pay for those services. Recognizing that one of two innocent parties would be the loser, the Court recognized the equitable doctrine of estoppel as a bar to carriers from recovering freight charges from a shipper who has already paid. The Appellate Court was influenced by the fact that the freight forwarder expected to be paid by the shipper, that the broker, North American expected to be paid by the freight forwarder, and that plaintiff Marx expected to be paid by the broker, North American. That evidence, together with the fact that neither Corning nor Danzas had retained Marx and the fact that "Marx created the risk of loss by its credit practices," were the basis for the court's affirmation of the trial court's judgment.

10. Feldman v. United Parcel Service, Inc., 2008 U.S. Dist. LEXIS 30637 (S.D.N.Y. 2008) (limitation of liability).

This is another "lost diamond ring" case, but this time the defendant, UPS, failed to obtain summary judgment limiting its liability to $100 under its tariff. Plaintiff wanted to ship a diamond ring to the jewelry store in New York City and did so by going to a UPS service center in Florida where the UPS clerk directed him to use the "I-Ship System" which was a computer terminal at the UPS counter. After following the prompts in the various computer fields, one of which stated that the I-Ship System will not print a label for which a value in excess of $50,000 is declared, the plaintiff managed to print out a shipping label nonetheless and allegedly told the UPS associate that he wanted to purchase insurance worth $57,000 on the jewelry. The UPS website had hyperlinks to its terms of service and stated that UPS' tariff was available upon request from the counter associate. Plaintiff paid a total of $235.50 for the shipping and insurance charges, but the ring never arrived in New York. Plaintiff then filed suit alleging six state law claims against UPS including fraud, negligence and deceptive business practices. UPS moved for summary judgment alleging common law preemption and that plaintiff had received both constructive and reasonable notice of UPS' tariff which excluded liability for items of unusual value. The court granted UPS' motion insofar as preemption of the state law claims on the basis of federal common law preemption pursuant to the ADA and the FAAAA.

Although the plaintiff did not explicitly assert any federal law claims, the court examined the effect of UPS' tariff limitation and whether it bound and applied to the plaintiff. Following an extensive and detailed analysis of the issue and consideration of several leading cases (Sam Majors, Treiber & Straub. and E.J. Rogers), the court found that under the Second Circuit's "reasonable communicativeness" test and the circumstances surrounding plaintiff's shipment of the ring, there was a question of fact as to whether UPS had provided reasonable notice to plaintiff of its tariff terms and limitations. The court noted that the UPS tariff itself was a 28 page document and that plaintiff would have to go through to find Item 460, which stated that "any package having an actual value of more than $50,000" may not be shipped. The court determined that what was directly before the plaintiff in the case (at the computer terminal) did not make the tariff limitation readily available to the plaintiff, and therefore a question of fact remained as to whether he was given a reasonable opportunity to learn of the limitation in question. Similarly, the court found that there was a question of fact for trial as to whether the tariff constituted a separate insurance contract and whether it was ambiguous.

11. Limited Brands, Inc. v. F.C. International Transportation Ltd., 2008 U.S. Dist. LEXIS 25447 (E.D. Ohio 2008) (prima facie case).

The issue here was whether the plaintiff could establish a prima facie case of good origin condition of a shipment of goods shipped in a sealed container on the basis of the ocean bill of lading only, and without corroborating testimony of an eye witness to the loading of the container. Plaintiff had purchased certain manufactured goods from Delta Galil Industries in Israel for its Victoria Secret stores at Columbus, Ohio. Plaintiff had an ongoing relationship with defendant Flying Cargo (though the parties could not produce a written contract evidencing that relationship), pursuant to which it paid Flying Cargo to transport its goods from Israel to Columbus, Ohio, and Flying Cargo, in turn, was responsible for paying the underlying carriers. In this instance, the container was loaded and sealed in Tel Aviv, Israel by Delta, who delivered the container to the Port of Haifa for transportation and ultimate delivery to Columbus, Ohio. Bills of lading were then issued by the ocean carrier, Danmar Lines. Defendant Flying Cargo, in compliance with plaintiff's requirements, then hired Cargo Connections, a third-party defendant, to transport the container from the container terminal to Columbus, Ohio. However, the container disappeared after it was picked up by Cargo Connection's subcontractor. Plaintiff sought to recover $582,947 as value of the lost goods.

The court found plaintiff's claim was governed by COGSA (citing Kirby), and determined that Flying Cargo functioned as a carrier, not a

Continued on page 13

TLP & SA and TLC present our

Hall of Fame Exhibitors 2008

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Dee Pack, Doug Taylor & Dave Myers
Recovery Management

Ed McQueen
Southeastern Freight Lines

Sonny Yandle
SAIA

Bill Mullis
Electric Guard Dog

Ingi Torfason
Bullet Freight

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San Diego '08

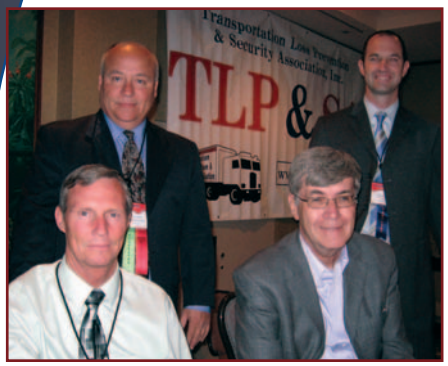
Highlights of the

2008 TLP & SA and TLC Conference in San Diego

Amy Hope, FMCSA

George Pezold gives his grand daughter Stella a piggy-back ride aboard the William D. Evans Steamboat

Eric Zalud, Esq. (Benesch, Friedlander, Coplan & Aronoff), Michael Molitoris (Volvo), Carol Wynstra (Snap-On Tools) & Ray Selvaggio, Esq. (Pezold, Smith, Hirschmann & Selvaggio)



Seated: Richard Lang (ABF) & Jim Hicks (Progeny Claims)
Standing: Moe Galante (NPME) & Jason Rogers (ABF)

Moe Galante (NPME), Victor Parker (TSA), Elena Melanich (Siltech), Bill Bierman (NAKBLaw)

Bill Bierman, Elena Melanich & George Pezold relax between meetings

Pete Zack (Shockwatch), Elena Melanich (Siltech), Bill Bierman (Nowell Amoroso Klein Bierman), Kathleen Jeffries (Scopelitis, Garvin, Light, Hanson & Feary) & Hillary Arrow Booth (Dongell Lawrence Finney Claypool) enjoy lunch on board the William D. Evans Steamboat

Moe Galante, Moria & Dan Saviola enjoy the President's Reception on board the William D. Evans Steamboat

Bill Bierman gives Martha Payne an Award Accepting for Ms. Payne is Eric Zalud, Esq., Benesch, Friedlander, Coplan & Aronoff

Bill Taylor, Esq., Hanson, Bridgett, Marcus, Vlahos & Rudy receives an Award from Bill Bierman, TLP & SA Exec. Dir.

Bill Bierman, Exec. Dir., TLP & SA and George Pezold, Exec. Dir., TLC

John O'Dell, HCCP, Landstar speaks about CCPAC (of which he is the Exec. Dir.)

Jeanine Bradley, Yvette Yandle, Kathy Busbee & Michael & Philip Busbee (McGinnis Lumber), Bill Bierman (Nowell Amoroso Klein Bierman, P.A.), Sonny Yandle (SAIA) & Ed Loughman (TLP&SA)

George Pezold at the dais

See you next year in

Saint Louis!

Dan Saviola, YRCW, Sgt. Sid Belk, CHP, Det. Nicholas Perez, Vernon, CA P.D., Analyst Merri Hawkins, CHP, Sgt. David Zapien, Vernon, CA, P.D., Sgt. Ken Huerta, LAPD

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From page 7

freight forwarder. However, the court then scrutinized whether the plaintiff had met its prima facie burden of proving that the cargo was delivered to the carrier in good condition. Its analysis focused on the fact that the goods shipped were in a sealed container, the contents of which were not observable, open to inspection or otherwise visible. In ruling the plaintiff had failed to meet its burden of proof, the court noted that although plaintiff had produced a number of exhibits relating to the packing of the goods and the ocean bill of lading, it had nonetheless failed to produce a witness who could testify as to the systems used for packing, preparation of the documents or the method by which the goods were counted and placed into the container. The court cited Sixth Circuit precedent that a bill of lading does not establish a prima facie case as to good origin condition if the goods in the container were not open to inspection and otherwise visible. Since plaintiff's witnesses testified only regarding the procedures used at the point of loading, it concluded that plaintiff's claim as to defendant Flying Cargo had failed.

12. Royal Insurance Company of America v. Orient Overseas Container Line Ltd., 514 F. 3d. 621 (6th Cir. 2008) (COGSA liability).

In this complex, detailed opinion, the Sixth Circuit considered whether a plaintiff/shipper's claim for loss and damage to ocean cargo was subject to the liability limitations prescribed by COGSA or those of the Hague-Visby Rules. The plaintiff, Royal, brought this subrogation action seeking to recover $5,700,299 for the loss or damage of over 5,000 automobile transmissions, shipped on racks, that were purchased by its insured, Ford Motor Company, from a vendor in France, consigned for delivery to Louisville, Kentucky. The transmissions were damaged during ocean transportation of the transmissions from France, under bills of lading showing the port of discharge as Montreal, Canada. There were multiple cities in the United States identified as the "place of delivery."

The district court had entered partial summary judgment in favor of defendant OOCL, ruling that its liability was limited to $500 per package under the ocean bill of lading. Plaintiffs had contended the Hague-Visby Rules, not COGSA, applied to the shipment, since there was no US port of destination, and, therefore, that the liability limit was greater than $500 per package. The Sixth Circuit, noting that the case presented "an intellectual puzzle," examined in detail the scope, effect and application of COGSA, the Hague-Visby Rules, Norfolk Southern Railway v. Kirby, and other authorities and concluded that COGSA did not apply because the parties were free to contract for the application of liability limits set forth in either Hague-Visby or COGSA. The Court noted the ambiguities and contradictions in the bill of lading, for which it criticized the parties.

The Circuit Court noted that Kirby's holding of admiralty jurisdiction over a dispute involving the land leg of a multi-modal transportation contract did not directly resolve the question of which maritime law applied in the case, and concluded that an intermediate stop (Montreal) in route pursuant to a multi-modal maritime contract with an ultimate destination in the United States, regardless of whether the stop is during the sea stage of transport or between the sea and land legs, should not prevent the application of COGSA liability rules as a matter of federal common law. Under COGSA, the Court found that it must evaluate the terms of the bill of lading, in this case Clause 30, as giving rise to a choice of law provision. The court noted that the bill of lading represented "extremely poor drafting" and criticized the district court for basing its summary judgment decision on the fact that Ford did not offer any extra consideration for the increase in OOCL's liability resulting from the use of Montreal as the port of discharge. The parties had not produced evidence as to their contractual intention under of OOCL's bill of lading which provided that all carriage thereunder "shall have effect subject to any legislation and acted in any country making the Hague or Hague-Visby rules compulsorily applicable." Finding that it was obligated to construe any ambiguities in the OOCL bill of lading against OOCL, the Sixth Circuit concluded that OOCL's liability would be subject to the Hague-Visby rules and not COGSA, reversed the district court's decision and remanded the case for further proceedings.

RISK MANAGEMENT OR SECURITY

By: Elena Melanich, PhD - CEO, Siltech Group, Moscow, Russia

According to our investigation, “security” has a much wider meaning than “risk management”. Actually, risk management is a system of what to do if a threat will come true. First, we have to deal only with threats that we see or imagine, and second, we calculate reality of this risk mainly based on statistics.

Today, it is very popular to talk about security. The word “security” includes so many meanings that sometimes it is very difficult to understand what it is. Generally, “security” means a special supporting system resulting in the following: 1. No risk for “object” to die. 2. “An object” has a great possibility for further development. “The object” can be a Person, a Family, a Company, a State or the World.

From these statements we can see that from the security point of view we have no right to lose “object”, whereas from the risk management point of view we should organize the “object” replacement system. According to our opinion it is a big difference!

SILTECH Group, as a security specialist, concentrates energy on proactive security measures. These measures result in the following: 1. To develop existing “art” of company procedures in order to divide and distribute personal responsibility in a very clear way. 2. To create a special monitoring/control system of this personal responsibility based on technical and non-technical devices. 3. To set up a specific feedback program based on the deviation from the planned parameters in the framework of the controlled system in order to take preliminary and the most cost effective measures against careless and criminal attitude.

In order to reach these goals we have created a new methodology at SILTECH that has already received several medals and diplomas. We have managed not only to practice this methodology, but have always got very high return of investment. Another practical advantage that we see in this methodology is a much more responsible attitude toward work resulting in a higher company culture.

Elena Melanich can be reached at elena@siltech.ru

BUSINESS – CAMARADERIE – NETWORKING

By: Ed Loughman - TLP & SA Staff Member

These three buzz words are often suggested as ways to help our companies. However, I am not sure how important most of you believe them to be. My ‘bride’ often asks why I prefer to go to a pub to watch a ballgame, when I can stay home in my Lazy Boy chair, with a beer at my side and no outside noise to disturb my enjoyment of the game. I am a baseball FAN (as in fanatic), and I would rather watch the game with my ‘cronies’, who always add to the game by expressing their (usually wrong) opinions. But for those of us who are in the ‘know’ the game is much more pleasurable among friends than watching it alone.

The same thing holds true in business. I know it is much easier to work out a difficult cargo claim if you have broken bread with your adversary than it is if you only hear the voice and do not know the face or person on the other side of the phone. That is where our TLP & SA // TLC Joint Conference comes in. You get to know the people with whom you deal. You get to understand their opinions and ideas about our transportation business. You get to enjoy the camaraderie of those people, because you had been networking. Seldom do we have an opportunity to share our thoughts, hear others tell their side, listen and learn from questions and answers as we do at our Joint Conference.

It is most gratifying not only to listen to (shippers & carriers), but to have the input of 3PL’s, Brokers, vendors (exhibitors) and transportation lawyers, all of whom come to the Conference to share their expertise. And at the end, you get to go back to share this knowledge and to better your company bottom line. You also have the opportunity to call a new found friend in the industry for his or her opinion on transportation matters, be they cargo claims, security issues or general operations. You get it all!

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CERTIFIED CLAIMS PROFESSIONAL ACCREDITATION COUNCIL, INC.

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www.ccpac.com

CERTIFIED CLAIMS PROFESSIONAL ACCREDITATION COUNCIL, INC. (CCPAC), announced the election of Officers and Board of Directors for the 2008-2009 term as follows:
President - **Marcus Hickey**, CCP, Forward Air, Inc.; Vice President Membership –**Wally Dammann**, CCP, MSI (USA) Claims, Inc.; Vice President Certification - **Roy A. Pietras**, CCP, FedEx Custom Critical; Secretary - **Brenda Baker**, CCP, Landstar RMCS, Inc. ; Treasurer - **Jean Zimmerman**, CCP, Risk Management Claim Services, Inc., and appointed two members to the Board of Governors; Immediate past president **Teresa Jones**, CCP, FedEx Freight, Inc. and past president **Cindy Carey**, CCP, TSI Logistics. The Board of Directors named **Jim Barber**, Forward Air, Inc. as editor of ProClaim, its semi-annual publication and **John O'Dell** as Executive Director. **William D. Bierman**, Esq., and partner in the law offices of Nowell, Amoroso, Klein & Bierman, P.A. was appointed to serve as General Counsel. CCPAC relocated its headquarters from Port Washington, MD to Jacksonville, Florida last year. CCPAC was established in 1981 and is a nonprofit organization that seeks to raise the professional standards of individuals who specialize in the administration and negotiation of freight claims for all modes of transportation worldwide. Specifically, it seeks to give recognition to those who have acquired the necessary degree of experience, education and expertise in domestic and international freight claims to warrant acknowledgment of their professional stature. Additional information or inquires can be obtained from their web site at www.ccpac.com

CCPAC scores big at the TLP&SA / TLC Joint Conference

Seven new Certified Claims Professionals:

Mark L. Peterson, Manager Insurance & Claims
APL Limited - Englewood, CO

Paul A. Lueck, Dir. of Administration & Compliance
Quality Logistics, LCC - Boca Raton, FL

B. Darlene Jones, Claims Manager
APL Logistics - Memphis, TN

Lorraine J. Amerikanos, Freight Claims Administrator
(Opted to re-take the exam for her 3-year recertification)
Da-Lite Screen Co. - Warsaw, IN

Susan Anderson-Ross, Associate Manager Claims & Risk
APL Limited - Englewood, CO

Nadia J. Martin, Claims Manager
Blakeman Transportation - Fort Worth, TX

Donna Wyss, CEO
CSC Salvage Sales Network - Indianapolis, IN

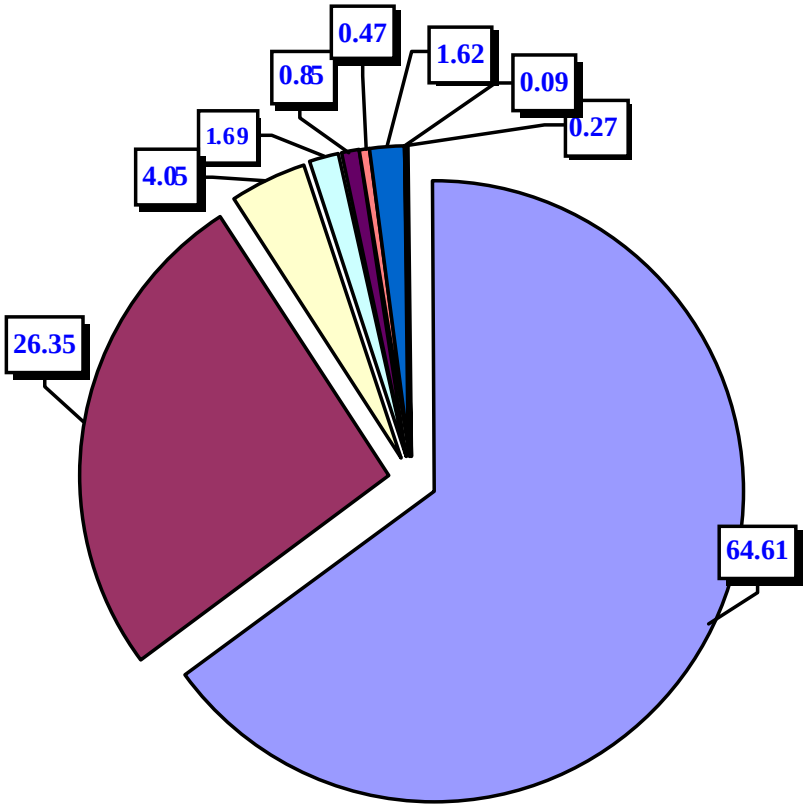
Congratulations from your friends at TLP & SA!!!

TLP & SA MOTOR CARRIER CLAIMS SURVEY – 2007

CLAIM CATEGORY	Total Gross % of $ Paid	% of Claims Paid Vs. Filed
Shortage	26.35 %	23.63 %
Theft / Pilferage	.85 %	.13 %
Visible Damage	64.61 %	68.85 %
Concealed Damage	4.05 %	6.27 %
Wreck / Catastrophe	1.69 %	.19 %
Delay	.09 %	.04 %
Water	.47 %	.17 %
Heat / Cold	.27 %	.06 %
Other	1.62 %	.66 %

Total numbers of claims paid Vs. number of claims filed.	75.76 %
Total dollars paid Vs. total dollars filed.	45.30 %
Net dollars paid Vs. total dollars filed.	41.00 %
% of claims filed to total number of shipments made.	.68 %
Total company claim ratio.	.99 %
Percent of claims resolved in less than 30 days.	78.00 %
Percent of claims resolved 31-120 days.	16.00 %
Percent of claims resolved more than 120 days.	6.00 %

2007
CLAIMS SURVEY CHART



Visible Damage - 64.61%
Shortage - 26.35%
Concealed Damage - 4.05%
Wreck/Catastrophe - 1.69%
Theft/Pilferage - 0.85%
Water - 0.47%
Other - 1.62%
Delay .09%
Heat/Cold - 0.27%

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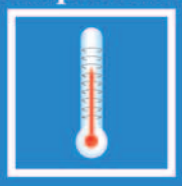

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