In Transit

Transportation Loss Prevention & Security Association

Winter 2008-9

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

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Sheraton Westport Lakeside Chalet in St. Louis, MO

JUROR NUMBER 1, WHY DO YOU DISLIKE TRUCKERS?

From the Executive Director, William D. Bierman, Esq.

I recently attended the ATA Forum for Motor Carrier General Counsel held in Lake Tahoe, Nevada. The scenery was spectacular. The lake and the mountains were majestic, but during one of the Sessions on dealing with the press and juries, I could not stop thinking about seeing the forest for the trees.

Many of us who try cases for a living and represent motor carriers take prejudice against our clients as a given. We spend hours with jury consultants and public relations people trying to craft questions and strategies to combat or ameliorate that prejudice. Whether you are trying a catastrophic personal injury case, a cargo claim, a suit for freight charges or a commercial matter, if you represent a trucking company you start out with two strikes against you. *When did the tide turn?*

Historically, as some of you may remember, truck drivers were thought of as Knights of the Road. A woman's prayer was answered (no chauvinism intended) if she were stuck on some desolate road with a flat tire and a truck driver came along, for surely he would stop and help out. Similarly a truck driver would radio for help if a man or woman had a breakdown and was helpless on the side of the road. Of course, that was in an era before cell phones.

The point is the general public was predisposed in favor of truckers. Truckers were viewed as courteous and helpful, and they carried the goods we used every day. I ask again, *when did the tide turn?* Perhaps the tide turned when the culture turned - more cars on the road, the population grew, people were harried, litigation exploded and special interests learned how to lobby on behalf of their constituents. Truckers became a nuisance on crowded highways, trucks themselves were bigger and more powerful, lottery-type verdicts were available to *"injured"* plaintiffs and their attorneys. All contributed to a change in perception. Perhaps that is why juror number 1 dislikes us!

I suggest that while we are forced to deal with many of these "misperceptions", we must embark on a positive campaign for truth. We must alert the public to the real facts in order to counteract the negative wave of publicity generated by the trial lawyers, the so-called "public interest" lobbies supported by our competitors, environmentalists, and politicians seeking votes by scaring the voters. We must create our own **accurate** perception.

As was pointed out at the ATA Forum, our industry has been left behind by the internet, bloggers, and new means of mass communication. The public, and especially the young public, get their information from some source other than newspapers, radio and television. Use any search engine under "truck accidents" for example, and you will retrieve hundreds if not thousands of results most of which are anti-trucker, i. e. trucks kill; drivers use alcohol and drugs; drivers consistently falsify their logs; drivers are sleep deprived; trucking companies work their drivers overtime to make money; truck accidents are caused by faulty equipment. No wonder juror number 1 is prejudiced against trucks and truck drivers.

We must spread the word to our companies to "advertise" their success both individually and through all of their trade organizations. By use of all available medium, our companies should advise the public: how we train our drivers; the high standards to which we hold our drivers; how we check logs; the way we maintain our vehicles; the way we self-investigate every accident and take any necessary remedial action. The public should know that most trucking companies are good corporate citizens. They contribute to local organizations and charities. They provide free deliveries to those in need during times of disasters. They work with and support state and local law enforcement. They live up to the strict federal regulations imposed upon them. The public must be aware trucking accidents are going down although truck miles are rising. Whenever it is determined an accident involving a truck was actually caused by another vehicle other than a truck, that information should be publicized as well.

The trucking industry needs to educate juror number 1 long before he or she ever becomes a juror. Only in that way will perceptions change. Only in that way will the trucking industry get a fair shake. Only in that way will juror number 1 no longer dislike us before any of the evidence is heard.

TLP & SA welcomes the following new members:

Joe West -
Mercer Transportation – Louisville, KY

Kristi Hebert -
SAIA Motor Freight – Duluth, GA

Jim Knetzer -
Leveraged Execution Providers (LXP)

Welcome Back:

Steven W. Block, Esq. -
Betts, Patterson & Mines, P.S. – Seattle, WA

Tammy Warn -
Interstate Distributor Co. – Tacoma, WA

Paul Britvich -
FFE Transportation – Dallas, TX

Bill Frank -
Lawrence Transportation – Rochester, MN

The Passing of Mary Kay Reynolds

We sadly inform you that Ms. Reynolds passed away last month after a long battle with cancer.

Mary Kay Reynolds was a graduate of Loyola Law School in Los Angeles, CA. She was a member of the Southwest Traffic Services group and practiced transportation law in all State and Federal Courts as well as the Ninth Circuit Court and the United States Supreme Court. Ms. Reynolds successfully defined the constitutionality of the Negotiated Rates Act of 1993. She served as National secretary for the Association of Transportation Law, Logistics and Policy, was a member of the TLA, American Bar Association, L.A. County Bar Association, worked 9 years for the ATSF RR, and was the President of the Southern California Chapter of the Association of Transportation Practitioners.

Mary Kay defined the term "zealous advocate". When she acted on your behalf you truly had a champion.

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NEWS RELEASE FOR IMMEDIATE POSTING……..

Jacksonville, FL … The Board of Directors of the Certified Claims Professional Accreditation Council acknowledges the newest Certified Claim Professionals of the CCP Candidates who have met the required standards of education, performance and conduct and have successfully passed the Fall 2008 examination demonstrating they possess the required degree of knowledge in the areas of law and principles and practices of freight claim management. Listed in alphabetical order: David Attix, Peninsula Truck Lines; Robert Houston, Nebraska Transport; Michele Johnson, Allstates World Cargo; Jean Komar, Oak Harbor Freight Lines; Rhonda Lopez, American Fast Freight; Jennifer Lundin, Interstate Distributor; Tony Moore, FedEx Freight; Jerry Norris, Dal-Tile Corporation; Beth Russell, Fedex Freight.

Congratulations to all for a job well done!

Established in 1981, CCPAC is a nonprofit organization that seeks to raise the professional standards of individuals who specialize in the administration and negotiation of freight claims covering all modes of transportation. 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. Inquires www.ccpac.com

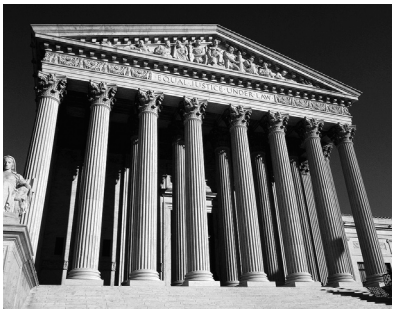
Get ready for the next TLP & SA // TLC Joint Conference

It will be held March 22 – 25, 2009 in St. Louis, Missouri.

It is NOT TOO SOON to make reservations at the Sheraton Westport Lakeside Chalet.

You should also make arrangements to EXHIBIT at this Conference as soon as possible, since we only have room for 20 booths.

Send an e-mail to Ed Loughman of the TLP & SA at Eloughman@nakblaw.com to get your booth.



Recent Court Cases

as analyzed by the Conference of Freight Counsel

William D. Bierman, Esq., Chairman • Marian Weilert Sauvey, Esq., Vice Chairman

A. Carrier Liability

1. Ziai v. KLM Royal Dutch Airlines, (2007) Can. LII 21896 (Ont. S.C.) (Canada: carrier liability).

In 1998, World of Art Inc. purchased 151 Persian carpets in Iran. It contracted KLM to fly them to Toronto. KLM carried the goods from Iran, routing them from Tehran to Amsterdam then to Detroit en route to Toronto. However, as the United States had at the time a trade embargo with Iran, the carpets were seized by the U.S. Customs authorities while they were in Detroit. The carpets were detained for over one year and by the time they were received by the consignee at Toronto it was alleged that they had sustained damage.

During an early stage of the lawsuit, it was determined that KLM was liable for breach of the contract of carriage and that it could not limit its liability under the governing Warsaw Convention. The matter ultimately proceeded to trial, just recently heard, on the question of the damages that could be claimed by the cargo interests. In addition to a claim for the lost value of the carpets on account of the damage, the Court had to deal with questions that are often raised in such cases as to whether the shipper could be reimbursed for interest paid on money borrowed to purchase the carpets in the first place. whether it was entitled to damages for loss of profit and whether it could recover damages for loss of business.

These questions were determined by an analysis of the classic case of Hadley v. Baxendale. in dealing with the issues, the Court dealt with the classic "two rules" set down by this case. The first rule stipulates that damages would be assessed based on the reasonable contemplation of the parties to the contract at the time of it being entered into. The second rule concerns so-called "special circumstances", which, if communicated by the plaintiff to the defendant at the time of the making of the contract, could increase the scope or quantum of damages awarded.

Applying the principles from Hadley v. Baxendale:

i. The claim for interest paid on the money borrowed to purchase the carpets in question amounted to a "special circumstance", the arrangements for the purchase of the product in first instance not being within the knowledge of KLM. KLM did not reasonably have in its contemplation the existence of any such loan and the high interest rate claimed.

ii. The Court however ruled that it would be within a carrier's "reasonable contemplation" that product of the quantity and quality being shipped would be for the intended purpose of resale involving a profit. As such, the loss of profit was calculated on the evidence and award.

iii. The Court ruled that in the particular circumstances the plaintiff could not recover damages for "loss of business". The plaintiff complained that it was forced to declare bankruptcy and was put out of business as a result of the failure of the timely delivery of the carpets, for which it sought large damages. However, the Court ruled that the particular financial status of a cargo interest amounts to a "special circumstance" which the carrier would not be deemed to he aware of. To attract this particular liability, the carrier would have to be advised of circumstances so precarious that if the product is not delivered on time that there would be a significant business repercussion.

Hadley v. Baxendale remains firmly entrenched in Canada and this case is a wonderful illustration of its application.

2. OneBeacon Insurance Company v. Haas Industries, Inc., 2008 U.S. Dist. LEXIS 33824 .D. Cal. 2008).

Plaintiffs insured, Professional Products, Inc. ("PPI") purchased certain electronic equipment from Omnion Video Networks to be shipped to New York City. Omnion hired defendant Haas Industries to transport the shipment, which was delivered short with an estimated loss of $105.647. After OneBeacon paid PPI's claim, it flied this subrogation action against Haas. Haas asserted the affirmative defense that its liability was limited to 50¢ per pound, which it had paid Omnion, and which constituted an accord and satisfaction defense.

On OneBeacon's motion for summary judgment, the court first scrutinized OneBeacon's standing to sue and was concerned that it could not find "a single case addressing the issue of whether an owner of goods, who was not listed on or a party to the bill of lading, did not negotiate with the carrier, and was not the receiving party of the shipment, has standing to sue for cargo loss." Ultimately, the court did not decide the issue because it concluded that Haas had presented evidence that it maintained a higher rate for declared value shipments, that Omnion was aware of that rate, that Omnion had prepared the Haas bill of lading and left the declared value box blank. Therefore, the court denied OneBeacon's motion for summary judgment in which it contended that Haas had failed to limit its liability under the Carmack Amendment. The court also questioned whether OneBeacon had shown that Haas' limitation was not "reasonable under the circumstances surrounding the transportation" as required by Carmack and denied summary judgment.

3. Gueye v. United Parcel Service, Inc., 2008 N.Y. Misc. LEXIS 2909 (New York 2008).

Plaintiff went to a UPS Store in New York City and shipped several packages to Georgia. He claimed he placed on the packages stickers containing the UPS logo with the words "C.O.D. Accept Money Orders Only!!" UPS's tariff provided that unless instructed to collect cashier's check or money order only, it would accept a check or other negotiable instrument issued by or on behalf of the consignee. Despite plaintiffs instructions, UPS accepted checks for some of the packages, some of which bounced. Plaintiff sued UPS for $17,557 in damages, plus service charges of $1,385, on several common law and state law claims. The parties cross-moved for summary judgment.

The court granted UPS' motion, dismissing some claims, but rejected UPS' argument that Gueye did not have standing to bring the action

against UPS because he had delivered his packages to one of the UPS authorized outlets. The court further ruled that the provisions in UPS' tariff prevented plaintiff from recovering on a breach of contract claim for UPS' acceptance of checks rather than money orders and. that as a result of Gueye's unconditional acceptance of the checks, he forfeited his right to sue UPS for breach of contract under the principle of ratification. As to checks which were less than the proper amount, the court ruled that plaintiff had failed to show he was entitled to summary judgment because he did not demonstrate which checks corresponded with which shipments and could not explain overpayments on other checks. The court further found that plaintiff had not shown that UPS had engaged in any deceptive act or practice or that it had intentionally deceived him or that UPS had breached a specific warranty. Only plaintiffs third cause of action for breach of contract survived.

4. Fraser-Nash v. Atlas Van Lines, Inc., 534 F. Supp. 2d 729 (S.D. Tex. 2008).

Plaintiff sought over $80,000 in damages against Atlas from her household goods move from Houston to Tennessee. Atlas sought summary judgment as to all of plaintiffs' claims.

Plaintiff's attorney filed a response to the motion, but withdrew as counsel when plaintiff did not sign the opposition affidavit. Atlas' motion for summary judgment was based on several arguments First, that plaintiff should not recover for lost items because she testified in her deposition that she still had 20 unopened boxes in her garage from the move. Second, that plaintiff could not meet her burden of proof on tender of the goods in good condition as she testified that her goods had been stored for between I and 4 years prior to the move. Finally, Atlas argued that Plaintiff failed to designate an expert witness on damages, and she testified that she could not provide values or repair costs without relying on third parties.

The Court granted summary judgment on all arguments, ruling that plaintiff could not meet her burden of proof on lost items since she did not open all of her containers after the move. As for damaged items, the Court held that plaintiff could not meet her burden of proof on tender of goods to the carrier. The Court adopted the Marks v. United Van Lines requirement that the shipper produce "substantial and reliable proof" as to the contents and condition of goods tendered to a carrier in boxes. Finally, without an expert witness, and without any expertise as to the value of lost goods, or the cost of repairs on damaged goods, the Court held Plaintiff could not meet her burden of proof on damages and granted summary judgment to Atlas on all claims.

5. Land O'Lakes. Inc. v. Superior Service Transportation of Wisconsin, Inc. 2005 U.S. Dist. LEXIS 36685 (E.D. Wis. 2008).

This was an interesting decision whereby the court, after a jury, trial, sua sponte vacated its prior decision (500 F. Supp. 2d 1150) dismissing plaintiff's conversion claim for damage to a shipment of butter. Defendant motor carrier sold the shipment at salvage for $29,101. The court vacated the jury verdict which was based on the salvage obtained by defendant, The court felt the verdict was based on an incorrect instruction as to salvage value because under 49 C.F.R. § 370.11(a) a carrier has a duty to send salvage proceeds to the shipper. The court vacated the jury's verdict and ordered a new trial because evidence showed that even though plaintiff did not inspect the allegedly damaged shipment, it had not abandoned or vacated its claim and the defendant carrier ought not to benefit from the salvage sale. The court then ordered a new trial.

6. Central Transport International, Inc. v. Global Advantage Distribution, Inc., 2008 U.S. Dist. LEXIS 8303 (M.D. Fla, 2008)

Plaintiff Central Transport filed a declaratory judgment action seeking to declare defendant G.E.'s assignment of its contract rights to defendant Sylvania to pursue damage claims against Central Transport was invalid and unenforceable, that claims were time-barred by the nine-month claim filing rule, that defendant Global lacked standing, that the subject freight damage was due to Global's conduct and that Global had filed false and groundless claims and misrepresented the value of its freight. Central Transport sought a declaration that G.E. was required to indemnify it for any and all damages pursuant to a transportation contract between them. Sylvania alleged several counter-claims for damage based on negligence, breach of the transportation contract, as assignee of G.E. and for violations of the Carmack Amendment.

The court denied Central Transport's motion for summary judgment as to the assignability of G.E.'s freight claims to Sylvania, concluding that the assignment did not violate the non-assignment provision of the Central Transport/G.E. contract. The court also denied Central Transport's motion for summary judgment on the nine-month claim rule because the assignment was not invalid. The court found that there were disputed issues of material fact as to Central Transport's declaratory judgment claim on the nine-month claim filing rule and on the issue of Global's standing to submit freight damage claims to Central Transport. The court found material factual disputes precluded summary judgment on the issue of whether defendant Global filed false and groundless claims and misrepresented the value of the freight to Central Transport. The court further found that because the assignment was not a breach of the transportation contract, there was no basis for indemnification of Central Transport. The court granted defendant Sylvania summary judgment on certain counter-claims. Sylvania's counter-claim for breach of the transportation contract as the assignee of G.E. was tried before a jury which returned a verdict in favor of Central Transport and which further found that Global had misrepresented the value of the freight.

B. Carrier Liability – Security

7. Great American Insurance Company v. M/C Mackinac Bridge, C.A. No. 05-CV-6537 (S.D.N.Y. 2008).

This claim involved a shipment of VCR.s transported from Finland to Chicago, Illinois. K-Line, the ocean carrier, issued its waybill and the parties agreed that the claim for missing VCRs was governed by COGSA (no Sompo issue for a change!).

The container was loaded and sealed in Finland and transported by vessel to Bremerhaven where K-Line placed a high security bolt on the container. Customs x-rayed the container in Port Elizabeth, New Jersey and no seal was missing. In Chicago, Norfolk Southern discovered the door to the container ajar and 38 of the alleged 600 VCRs were in the container. There was a hole in the railroad's fence and a well-traveled path.

Plaintiffs motion for summary judgment based upon a prima facie case was denied and Norfolk Southern's cross-motion was denied, in part. The court agreed with Norfolk Southern that damages were limited to net invoice cost, plus insurance and freight, and not the destination value as alleged by plaintiff. K-Line's cross-motion against Norfolk Southern for indemnity, based upon the language in their Circular, was granted.

The case will proceed to trial as plaintiff must prove that 600 VCRs were loaded into the container in Finland. In our opinion, the weight listed on the K-Line waybill (gross weight - tare weight) did not reflect that 600 VCRs were loaded into the container. This decision illustrates the difficulty for a plaintiff to prevail via

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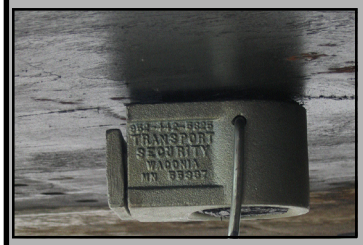

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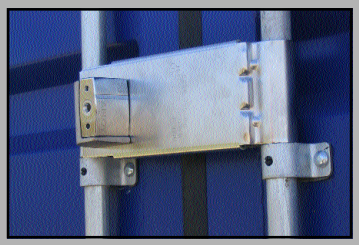

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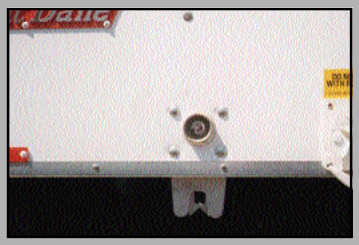

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summary judgment on a prima facie case argument.

8. East Coast Transport & Logistics LLC v. Cesar Transport, Inc., 2008 U.S. Dist. LEXIS 21032 (D.N.J. 2008).

Plaintiff, a broker, sued defendants for compensatory and punitive damages on a hijacked shipment of electronic equipment during transportation from New Jersey to Florida. One of the defendants. Cesar Transport, had furnished a certificate showing it had $100,000 of cargo coverage but its insurer, Underwriters at Lloyds, only covered up to $20,000 for losses due to theft. Plaintiff ECT paid its customer/shipper $65,818, the alleged value of the cargo, and then used Cesar Transport. who was defaulted following the removal of the case from state to federal court, Cesar moved to vacate the default and disputed that it was a "connecting carrier", contending that, at most, it was a freight forwarder. The court granted Cesar's motion to vacate the default because it believed its insurance carrier was protecting its interests in the case and recognized that a question of fact existed as to Cesar's function with regard to the shipment. Question: what standing did ECT, a broker, have to file suit in the absence of an assignment from the shipper?

C. Limitation Period

9. Royal International LLC v. CMA CGM America, Inc., 2007 Ohio App. LEXIS 5780 (Ohio 2007).

Plaintiff Royal sued defendant CMA for $10,566 in damage to a shipment of goods shipped under an ocean bill of lading from India, presumably to Ohio. A default judgment was entered against defendant CMA who appealed on the grounds that the dispute was controlled by COGSA whose one year statute of limitations barred the plaintiffs' lawsuit. On appeal, the Court of Appeals of Ohio rejected that argument and ruled that the COGSA one year statute of limitations is not jurisdictional and that the lower court had subject matter jurisdiction to enter the default judgment. The Court went on also to reject defendant CMA's argument that it had demonstrated "excusable neglect" under Rule 60(b) and affirmed the lower court's default judgment.

D. Limitation of Liability – (Canada)

10. Canadian Pacific Railway Company v. Boutique Jacob Inc., 2008 FCA 85 released on March 6th, 2008.

The main issue raised in the appeal was the interpretation of section 137 of the Canada Transportation Act, S.C. 1996, c. 10 which allows a rail carrier to limit liability by means of a written agreement signed by the "shipper".

Claimant had retained a freight forwarder in Canada, Panalpina Canada, to make arrangements for the carriage of its cargo from Hong Kong to Montreal. Through this freight forwarder it entered into a contract of carriage with Pantainer Ltd. an NVOCC (non-vessel operating carrier). Pantainer issued an express bill of lading. The claimant did not declare any value for its cargo. The cargo was damaged in a derailment. Paintainer had entered into a contract with OOCL, an ocean carrier who issued a bill of lading for carriage from Hong Kong to Montreal. In turn OOCL retained the services of CPR pursuant to a confidential contract.

The Federal Court of Appeal concluded the shipper was OOCL. The Court also held that CPR could limit its liability based on the 00CL bill of lading. The Federal Court of Appeal found that the OOCL bill of lading had a Himalaya clause which allowed CPR to "have the benefit of all the rights and defences provided for in this Bill of Lading or by law." The OOCL bill of lading also allowed the Carrier to sub-contract itsduties of carriage. The Court held that the OOCL bill of lading could be used by CPR to its benefit. The appeal court held that CPR could limit its liability to the OOCL liability which amounted to $1,432.89.

11. Canadian National Railway Company v. Sumitomo Marine & Fire Insurance Company Ltd. 2007 QCCA 985 (leave to appeal to the Supreme Court of Canada refused February 28, 2008)1.

In 1997, Sanyo Canada inc. (Sanyo) hired TransX-Intermodal Ltd. (TransX) to transport goods from Richmond, British Columbia to Montreal, Quebec. The value of the goods was insured by the Applicant, Sumitomo. TransX issued a bill of lading stating that Sanyo was both the shipper and the consignee. Since the bill of lading did not indicate the value of the goods, the motor carrier's liability for damage to property was, pursuant to the regulations in force in British Columbia, limited to $2 a pound. TransX in turn hired the Respondent, CN, to transport the goods between the Vancouver and Montreal railway stations. It agreed on the application of tariff that also limited liability to $2 a pound. On March 26, 1997, the train carrying the goods derailed in British Columbia, and the goods were a total loss. Sumitomo compensated its insured for an amount - $306,387.33 -- representing the total value of the goods. CN, relying on the limitation of liability, paid TransX $62,254. TransX gave that amount to Sanyo, which passed it on to Sumitomo.

Sumitomo, being subrogated to Sanyo's rights for the amount of $244.133.33, then brought an action in liability against CN. In its defence, CN argued that the limitation of liability provided for in the tariff was the maximum amount it could be required to pay for the damage, since the contract was a "written agreement signed by the shipper" within the meaning of s. 137 of the Canada Transportation Act. That section provides that "[a] railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper". The Superior Court allowed Sumitomo's action. The Court of Appeal reversed the decision, holding that the federal Act contained everything needed to decide the case and that there was no need to rely on the principles of Quebec civil law. As well, the concept of "shipper" had to be understood in a [translation] "realistic" way. Since only TransX could be characterized as a shipper, Sanyo could not bring an action against CN.

E. Limitation of Liability – Security

12. Delta Express LLC v. NYK Line (North America), Inc., 2008 U.S. Dist; LEXIS 11770 (W.D. Ark. 2008).

This is an interesting decision in which the plaintiff, an inter-modal motor carrier, had a Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA") with defendant NYK which stated "motor carriers must maintain Cargo Insurance in the amount of $100,000," After a shipment of computer parts worth $318,427 was stolen, plaintiff filed this declaratory judgment action seeking to limit its liability to $100,000 based on the language in the UIIA. The court granted NYK's motion for summary judgment, finding that the minimum amount of "insurance" specified in the UIIA did not mean that plaintiffs liability was so limited. The court enforced the "plain meaning of the contract" and rejected plaintiffs argument that it would have charged a higher rate had it known of the actual value of the shipment.

13. Hanson v. America West Airlines, Inc., 544 F. Sapp. 2d 1038 (C.D. Cal. 2008).

In this a very interesting and entertaining case, plaintiff sued defendant for loss of a "valuable robotic head modeled after famous science fiction author Phillip K. Dick ("Head")," allegedly worth $750,000. Plaintiff had flown from Texas to San Francisco carrying the Head in a duffel bag which he put in the overhead storage bin. 1n his haste to get off the flight to catch a connecting flight, plaintiff left the Head behind ("lost his head"). When he got to San Francisco, he spoke to an employee of defendant who told him the Head had been found and would be sent on to San Francisco with "special security procedures". But alas, the Head never arrived. Plaintiff filed suit in California state court, defendant removed to federal court and moved for summary .judgment. The court granted defendant's motion on the basis that the contract of carriage provided that defendant would assume no responsibility for items carried in the passenger compartment of the aircraft and that defendant had provided plaintiff with reasonable notice of its limited liability and a fair opportunity to buy higher liability. The court also rejected plaintiffs argument that defendant had deviated from the contract of carriage, and ruled that an agent cannot bind its principal if they have no actual or apparent authority to do so. ["These theories, while heady, are insufficient...defendant may have done everything as promised, only to fall victim to a head hunting thief or other skullduggery."] The court granted defendant's motion for summary judgment, "hoping that the android head of Mr. Dick is someday found, perhaps in Elysian Field of Orange County, Dick's homeland, choosing to dream of electric sheep".

F. Preemption

14. Schoenmann Produce Co., Inc. v. BNSF Railway Company, 2008 U.S. Dist. L.EXIS 8278; 2008 Westlaw 336296 (S.D. Tex. 2008).

Plaintiffs grow and ship produce. They contracted with BNSF to transport and deliver 33 shipments of potatoes from California to Houston. The potatoes were to be carried on refrigerated rail cars. Upon arrival, the potatoes were rotten and damaged, and plaintiffs alleged BNSF failed to start the refrigerators on the rail cars. Plaintiffs sued BNSF but attempted to avoid Carmack preemption by seeking a declaratory judgment, arguing that the preemptive effect of Carmack does not reach declaratory judgment claims. The Court rejected this argument, holding that a declaratory judgment proceeding arising from a completed interstate shipment falls within Carmack preemption.

15. Arkansas Aluminum Alloys, Inc. v. Emerson Electric Co., 2007 U.S. Dist. LEXIS 95350 (W.D. Ark. 2007).

Plaintiff Arkansas Aluminum sued defendant Emerson Electric under the Carmack Amendment and state law causes of action for damages on 190 shipments of aluminum ingots transported from Arkansas to Mexico during April and May 2007. The shipment arrived "short" at destination. The court granted Emerson's motion to dismiss the state law causes of action on the ground of Carmack Amendment Preemption, ruling that the statute applied to shipments destined to adjacent foreign countries.

16. Briscoe v. Price-Coomer Relocation, Inc., 2008 U.S. Dist. LENS 32301 (E.D. Ky. 2008).

Plaintiff sued defendant van line for $7,928 in Kentucky state court. Defendants removed the action to federal court and then moved to dismiss on the grounds of Carmack Amendment preemption of plaintiff's state law claims. Although it recognized the defendant's preemption argument, the court remanded the case to state court because the complaint did not allege damages in excess of $10,000.

17. Delta Leasing LLC v. American Fast Freight, Inc., Superior Court for the State of Alaska, 3rd Judicial District at Anchorage, Case No. 3AN-07-10226 (200k).

This is the court's order granting American Fast Freight's (a broker) motion for summary judgment on the basis of preemption under 49 U.S,C. § 14501(c). AFF's memorandum in support of its motion was previously included in our January 6, 2008 Agenda. This order is a nice summary of preemption under 49 U.S.C. § 14501(c)(I) as to claims against brokers.

18. McGourty v. Collins, 2007 U.S. Dist. LEXIS 94400 (W.D.N.C. 2007).

This lawsuit arose from a household goods shipment moving under an interstate bill of lading. The magistrate judge had recommended dismissal of the plaintiff's claims against defendant Bekins Van Lines because they were preempted by the Carmack Amendment. In this decision, the court adopted the magistrate judge's recommendation and dismissed plaintiffs complaint with leave to file an amended complaint since no responsive pleading had been filed by the defendants.

G. Jursidiction/Removal

19. Astroworld LP v. Jones Motor Co., Inc., 2008 U.S. Dist. LEXIS 7569; 2008 Westlaw 821547 (N.D. Tex.).

Astroworld sued the motor carrier in state court over damage to a shipment that moved from Astroworld to Six Flags. The carrier removed the case to federal court based on federal question Carmack preemption jurisdiction. While one might assume that a shipment from Astroworld to anywhere would be an interstate or foreign shipment, in reality the load only moved from Houston, Texas to Arlington, Texas. In the briefing to the Court on the motion to remand, the parties conceded, and the Court recognized, that the elements for diversity jurisdiction were present on the face of the state court petition. Nevertheless, the Court ruled that because the Defendant did not remove the case based on diversity jurisdiction, but rather did so only based on federal question jurisdiction, the case would be remanded.

H. Jurisdiction/Removal – Security

20. Interested London Underwriters v. Kelly Global Logistics, Inc., 2008 U.S. Dist. LEXIS 15768 (S.D.N.Y. 2008).

Polo Ralph Lauren hired Kelly Logistics to provide logistics services related to the delivery of merchandise from the port of entry in Miami to Polo's distribution center in Greensboro. North Carolina pursuant to a contract. For this particular load of khaki pants, Kelly Logistics hired Transpro, a broker, to arrange for the delivery. Transpro hired truckload carrier Heartland Express to deliver the goods.

The Heartland driver picked up the load on a Friday, parked the loaded trailer along a busy road in Ft. Lauderdale, went to his gun club, took his mother shopping and spent the weekend at his home in South Florida. When he returned to his tractor trailer on Sunday night, it was gone.

Subrogated insurers for Polo filed suit in the SDNY against Heartland, Transpro and Kelly Logistics for approximately $514,000 for lost cargo. Transpro and Kelly Logistics moved

to dismiss pursuant to Fed.R.Civ.P. 12(b)(2). Heartland did not join in the motion and answered separately.

The Court conducted an exhaustive analysis of the facts and, after ruling that it had no jurisdiction over Transpro, granted defendants' motion to transfer the case to the Southern District of Florida. The Court conducted a fairly significant "interests of justice" analysis in this regard.

It is notable that the Court transferred the case even though it acknowledged that suit was brought in New York pursuant to the aforementioned contract between Kelly and Polo. The Court ruled that "although Kelly is bound by the forum selection clause in the Agreement", it nonetheless transferred the case pursuant to 28 U.S.C. § 1406 since, in its view, the interests of justice in having the entire case tried in South Florida outweighed the forum selection clause.

21. Prime Materials Recovery, Inc. v. Martin Roy Transport, 2008 U.S. Dist. LEXIS 39784 (D. Conn. 2008).

The plaintiff, headquartered in Connecticut, shipped silver/plated copper bars from South. Carolina to Quebec, Following the theft of the shipment from the defendant's Quebec terminal, plaintiff sued for $510,000 in the U.S. District Court in Connecticut. Defendant moved to dismiss on grounds of forum nonconveniens. The court denied the motion, finding that deference should be given to plaintiffs choice of forum. Even though suit could have been brought in Quebec, where a liability limitation would apply, the private interests of the parties compelled keeping the case in Connecticut. The court ruled that the physical location of the bill of lading in Quebec was irrelevant and that witnesses could readily travel to either Quebec or Connecticut. The court also rejected the defendant's argument that there was a need to "view" the area of the theft because under the Carmack Amendment the carrier would be strictly liable.

I. Freight Charges

22. S.G.T. 2000 Inc. v. Molson Breweries of Canada Ltd. 2007 Q.C.C.A. 1364 (Can. L.I.I.). (Canada).

In this case, Consumers Glass hired the plaintiff carrier to carry a series of shipments of bottles to the receiver, Molson Breweries of Canada Ltd. ("Molson Breweries"). This series of shipments involved carriage from the Ontario facility of Consumers Glass across the Ontario border into other provinces. The bill of lading documentation in each case contained an endorsement that freight charges were "pre-paid". Once delivery was effected in each case, the carrier would invoice Consumers Glass for the freight charges and, independent of this, Consumers Glass, as the glass bottle supplier, would invoice Molson Breweries for the supply cost of the cargo which included a component for the freight charges. Molson Breweries dutifully paid Consumers Glass the supply invoice. However, Consumers Glass only paid a portion of the freight charges that it owed to the carrier before it became insolvent.

Looking for payment of the outstanding freight charges, the carrier invoked the Federal (Canada) Bills of Lading Act which prescribes the following at. Section 2:

Every consignee of goods named in a bill of lading, and every endorsee of a hill of lading to whom property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading has been made with himself.

Given the demise of Consumers Glass, would the carriers go without payment in full, or would Molson Breweries pay "extra" beyond what it had already paid for the glass bottles?

The Quebec Court of Appeal found that the requirements listed in the above statutory excerpt were satisfied, as Molson Breweries was both named as the consignee in the bill of lading and had become the owner of the shipped bottles at the time of shipment from Consumers Glass. While Molson Breweries pointed to the "pre-paid" reference on the bills of lading as amounting to some type of waiver or exemption from ally liability that the carrier could look to it for payment of the outstanding freight charges, the Court ruled that this reference, by itself, was not enough to deprive the carrier of the protection of the statute. Something greater would be needed to amount to a waiver by a carrier that it was abandoning a statutory right beyond the mere reference to 'pre-paid' - which, simply in and of itself, acted only as an indication as to who the carrier would look to in first instance (i.e. the shipper) for the payment of freight charges.

As this federal legislation was found applicable in respect of this inter-provincial series of shipments, so too might it apply in respect of export shipments from Canada into the United States, where Canadian law is found to be the 'proper' law of the contract. Might this provide the basis for an argument - without necessarily resorting to what the U.S. law might be on point - that the consignee agreed to pay charges by accepting delivery of freight? This certainly makes for an interesting issue in respect of American consignees of Canadian origin freight. How might the Canadian parliament purport to legislate in respect of a U.S. based receiver of cargo? There may well be an argument that this statutory protection for the carrier is given effect as a matter of being an implied contract term entered into between the cargo interests to a transaction and the unpaid carrier.

J. Freight Forwarder/ Broker Liability

23. Electroplated Metal Solutions, Inc. v. American Services, Inc., 2008 U.S. Dist. LEXIS 8999 (N.D. III. 2008).

Plaintiff, an Illinois company, sued defendant, Two Brothers, a California broker, for damage to a shipment of machinery. Two Brothers had brokered from California to Illinois. Two Brothers had previously been dismissed from the case but the plaintiff then sought leave to file an amended complaint adding breach of contract and negligence claims against Two Brothers, Two Brothers opposed the motion, arguing that plaintiffs proposed amended complaint failed to state a claim and that it was not subject to personal jurisdiction in Illinois. The court rejected the failure to state a claim argument, based on Carmack Amendment preemption, ruling that Carmack does not exempt brokers from paying for their own negligence and that they have a duty to use reasonable care in scheduling, arranging, preparing and brokering transportation.

The court also rejected Two Brothers' argument that it was not subject to Illinois' long-area statute, because it had "purposefully availed itself of the Illinois motor carriage market", under International Shoe.

K. Warehouse Liability

24. Sasol Wax Americas, Inc. v. Hayes/Dockside, Inc., 2008 U.S. Dist. LEXIS 39045 (E.D. La. 2008).

Plaintiff Sasol had stored various wax-based products in defendant Hayes' Louisiana warehouse which were damaged as a result of Hurricanes Katrina and Rita in August 2005. Hayes notified Sasol of the damage to its products on October 27, 2005. On April 7, 2006 Sasol told Hayes that it was making a claim for the damage, and on August 25, 2006 filed the present lawsuit. Hayes moved for summary judgment on the grounds that the warehouse receipt is-

sued to Sasol required that as a condition precedent to recovery, claims must be filed no later than 60-days after the owner is notified of the loss or damage to the goods and that no lawsuit could be maintained unless timely written claim has been given and unless suit is commenced within nine months after the owner is notified of the loss or injury. The court granted Hayes' motion for summary judgment because plaintiff Sasol had failed to comply with the condition precedent to recovery by having waited more than five months, far outside the 60-day time limit, to file notice of its claim with Hayes and because it did not commence suit against Hayes until nine months and 28 days after it received notice of the loss, also not in compliance with the warehouse receipt terms and conditions. The court recognized that in Louisiana parties to a contract may shorten the "prescriptive period" which mandates that suits be filed in a certain time and rejected plaintiffs argument that the court should set aside the nine month time limitation due to hurricanes Katrina and Rita as against public policy.

L. Miscellaneous

25. Norfolk Southern Railway Company v. Basell USA Inc., 512 F. 3d 86 (3' Cir. 2008).

Basell and NS entered into a 5 year agreement pursuant to which Basell promised to use NS for 95% of its transportation needs along a certain lane in exchange for discounted rates. About two years later, Basell entered into a contract with CSX pursuant to which Basell promised to use CSX for 95% of its transportation needs along the same lane identified in the NS agreement. When NS discovered the breach, it filed suit alleging material breach and repudiation, and because the contract should be deemed terminated by Basell`s having entered into a second conflicting contract, NS sought restitution by imposing tariff rates on all freight that moved after Basell entered into its contract with CSX. On cross motions for summary judgment, the court held that there was a breach, but that it was not a material breach, and awarded NS only lost profits. On appeal, the US Court of Appeals vacated and remanded, holding that Basell's actions certainly could qualify as material breach or repudiation, allowing for termination and restitution. The Court of Appeals` ruling provides significant guidance as to what constitutes a "material breach" of a transportation contract. The case was tried in the district court and awaits a final ruling.

26. In Re: MV~ DG Harmony, 518 F. 3d 106 (2d Cir. 2008) (miscellaneous shipper liability to carrier).

The U.S. Court of Appeals in New York has ruled that a shipper of dangerous cargo has a duty to warn the ocean carrier when the method of packaging and stuffing in a container presents special risks, and the carrier has the burden of proving that the warning, if given, would have prevented the harm.

The Appeals Court did find that as a matter of law, the shipper had a "duty to warn" the carrier and stevedore of the risks involved because of the special way the dangerous cargo was packaged in this case. However, it vacated the judgment against the shipper because the trial court failed to address "whether a warning, if given, would have prevented the harm." The case was sent back to the trial judge for further proceedings on that issue of causation.

The shipper, PPG Industries shipped 10 containers of calcium hypochlorite ("cal-hypo"), an unstable cargo that continuously decomposes at room temperature and is prone to "thermal runaway" that can result in explosion and fire.

The Court found than the 1MDG Code provided general information about the properties of the cal-hypo and safe carrying temperatures that could be a guide for carriers. But the cargo here had been placed in unusually large drums, which were palletized and shrink-wrapped, and 30 pallets were stuffed by the shipper into each container. The Court of Appeals ruled that the shipper had a duty to provide a warning that would fully inform the vessel of all the risks involved in shipping cal-hypo "in the manner in which it was shipped". The way the cal-hypo was packaged, the critical temperature could be much lower. The Appeals Court found that the shipper could not be held "strictly liable" under COGSA because that rule does not apply where the carrier knows the cargo poses danger, "regardless of whether the carrier is aware of the precise characters". The Appeals Court agreed the shipper should be held liable for failure to warn about danger inherent in the cargo that the "ship's master or stevedore could not reasonably be expected to be aware", such as the specific way in which the cargo in question was packaged. The carrier had a right to rely on the "shipper's attestation" describing the cargo. However, to prove causation, the carrier had to prove that if warned about how the cal-hypo was packaged, it would have affected the carrier's stowage decision. The district court had not addressed this second element of causation. The case was remanded to the district court to deal with the second prong. "Liability for failure to warn is only appropriate if there is evidence that a warning would have altered the carrier's action."

27. Knight Transportation, Inc. v. Westinghouse Digital Electronics, LLC, 2008 Westlaw 194739; 2008 U.S. Dist. LLXIS 4341 (N.D. Tex.) (miscellaneous attorney's fees). (Security)

Westinghouse, through its brokers Top Ocean and Topland, shipped 360 plasma televisions from California to Oklahoma. The shipment was stolen while Knight's trailer was overnighting in Dallas. Westinghouse's insurer paid the loss and sent a claim to Knight, which filed a declaratory judgment action in Dallas, to assert the limitation of liability in the broker's bill of lading. Westinghouse counterclaimed against Knight for loss of the shipment and attorneys' fees. Knight moved to dismiss Westinghouse's claim for attorneys' fees. Westinghouse argued that it bad contracted with its broker for the shipment, and by virtue of the agreement and 49 U.S.C. §14101(b), Westinghouse could recover its attorneys' fees. Knight pointed out, and the Court eventually held, that if the Westinghouse/broker agreement governed liability issues, the contract was silent on attorneys' fees and thus, the transaction defaults to Carmack law. In the Fifth Circuit, attorneys' fees are not recoverable by a shipper under the Carmack Amendment. The motion to dismiss Westinghouse's attorneys' fee claim was granted.

NEW IATA AIRWAY BILL CONDITIONS OF CONTRACT

By: Rich Furman

Effective March 17, 2008, a new IATA. resolution, 600b, became effective. The resolution set forth the industry-preferred version of the IATA air waybill Conditions of Contract Resolution 600b is the abbreviated and modernized Conditions of Contract that incorporates by reference both the Warsaw Convention and the Montreal Convention.

While the Conditions of Contract set forth in Resolution 600b represent a number of important changes to the previous version of the Conditions, the terms relating to the ability of a carrier to limit its liability, notably new paragraph 4, could actually open indirect air carriers (LAC) to full liability for loss, damage or delay, in certain circumstances if they adopt the new Conditions of contract to mirror those of the scheduled airlines.

Under the old version of the Conditions of Contract there was a provision that addressed this issue that stated:

Except as otherwise provided in carrier's tariffs or conditions of carriage, in carriage to which the Warsaw Convention does not apply, carriers' liability shall not exceed USD 20.00 or the equivalent per kilogram of goods lost, damaged or delayed, unless a higher value is declared by the shipper and a supplementary charge paid.

However, this provision was changed by Resolution 600b, to read:

For carriage to which neither the Warsaw Convention nor the Montreal Convention applies, Carrier's liability limitation shall not be less than the per kilogram monetary limit set out in the Carrier's tariffs or General conditions of carriage for cargo lost damaged or delayed, provided that any such limitation of liability in an amount less than 17 SDR per kilogram will not apply for carriage to or from the United States. (Emphasis added)

While generally speaking scheduled airlines maintain tariffs that would protect their ability to assert a limitation of liability in circumstances where Warsaw or the Montreal Convention may not apply, it is far less common, if non-existent, for an IAC to maintain such a tariff.

As a consequence where an IAC has undertaken to provide door-to-door service, for example, if it were to adopt the foregoing term of the new Conditions of Contract, it would be unable to assert a limitation of liability for pre- or post-carriage transport or handling of the shipment, absent a tariff term, incorporated by reference by the revised Conditions of Contract, addressing such carnage.

In view of the foregoing, IACs need to ensure that they not blindly adopt the new Condition of Contract term under discussion. Rather, they should substitute a term that is designed to protect their ability to maintain a limitation of liability where Warsaw and the Montreal Convention no longer covers the shipment.

As an example of such a term, the following recommended:

If not governed by the Warsaw Convention, the Warsaw Convention as amended by the Hague Rules, the Warsaw Convention as Amended by Montreal Protocol 4, the Montreal Convention, at any other international treaties, laws, other government statutes or regulations, orders, or requirements, Carrier's maximum liability for loss, damage, delay, shortage, miss-delivery or non-delivery shall be 17 SDRs per kilo or the actual value of the loss, whichever is less, unless a higher value for carriage is declared on the face hereof and an additional charge is paid for such declaration.

Counsel for IACs are urged to recommend a similar term be incorporated in their client's Conditions of Contract on the reverse of their house air waybills.

TENNESSEE ANTI-INDEMNIFICATION STATUTE

By: Ken Bryant / Matt Grimm

Tennessee's state legislature passed an anti-indemnification statute in April, 2008. The bill was drafted by CFC member Dale Allen of Miller & Martin PLLC in Nashville. The bill was passed at the request of the Tennessee Trucking Association, a client of the law firm. The purpose of such a statute is to set forth a public policy that contracting parties in transportation agreements cannot require that the other party indemnify them for their own negligence. The statute is similar to those in other states. To date, nine states have passed anti-indemnification legislation. Anti- indemnification statutes raise several interesting issues. One of the most significant may be the preemptive effect of federal law, including the FAAAA and the recent United States Supreme Court decision in *Rowe v. New Hampshire Motor Transportation Association*. Also, issues arise in whether parties may negotiate around the Tennessee statute by having another state's law apply, especially when a carrier's insurance policy requires the application of Tennessee law. Finally, the UIIA exception in the statute and intermodal interchange agreements is an effort to avoid federal preemption in this area. The legislation will provide new fodder for judicial interpretation and explanation.

Many of the attendees at our San Diego Conference asked if we could furnish a list of Law Enforcement Personnel around the country who work on cargo theft. *This is that list*. We suggest you photocopy it and post it around your facilities so those who need it will have it handy in the unfortunate event of an incident:

CARGO THEFT TASK FORCES CONTACT INFORMATION

CARGOCATS

L.A. County Sheriff's Department
Sergeant Rod Johnson
3010 E. Victoria Street
Rancho Dominguez, CA 90221
(310) 678-4353
rbjohnso@lasd.org
Fax (310) 639-1070

CTIP

California Highway Patrol Cargo Theft Interdiction Program
Captain Ryan Okashima
rokashima@chp.ca.gov
Captain Steve Reyes
(714) 288-6336
sreyes@chp.ca.gov
Fax (619) 527-6954
fnavarro@chp.ca.gov
(310) 513-7800
Fax (951) 538-7128
Mary Hawkins
239 N. Avalon Blvd
Willmington, CA 90744
(310) 513-7800

Northern Division
Sergeant Ward Radelich
1515 Clay Street
Oakland, CA 94612
wradelich@chp.ca.gov
(510) 622-4613 Fax (510) 622-4637

AIRCATS

San Francisco Int'l Airport
Sergeant Wes Matsuura
P.O. Box 250747
San Fransisco, CA 94125
wmatsuura@co.sanmateo.ca.us
San Matao County Sheriff's Office
(650) 821-6203
Fax (650) 877-5449

BADCATS

Los Angeles PD
Lieutenant John Fletcher
150 N. Los Angeles Street Room 302
Los Angeles, CA 90012
(213) 485-2509
21083@lapd.lacity.org
Fax (213) 847-3791
Los Angeles PD-LAX Airport Crimes Unit
Sergeant Steve Savala
24823@lapd.lacity.org
802 World Way
Los Angeles, CA 90045
(310) 348-3931
Fax (310) 645-2960

TOMCATS

South Florida
Miami-Dade Police Department
MDPD Lieutenant Twan Uptgrow
9105 N.W. 25th Street, Suite 2071
Miami, Florida 33172
(305) 471-3400
tuptgrow@mdpd.com
Fax (305) 471-3410

Florida Statewide Cargo Theft Task Force
Florida Highway Patrol
Lieutenant Tony Bartolome
P.O. Box 593527
Orlando, Florida 32859
(407) 858-3233
bartolome.tony@fhp.hsmv.state.fl.us

Marion County Sheriff's Office Cargo Theft Task Force
Captain Tommy Bibb
P.O. Box 1987
Ocala, Florida 34475
(352) 368-3542
tbibb@marionso.com

Southeast Transportation Security Council
US Department of Agriculture OIG
SSA Ken Golec
404 West Peach Tree Street, Suite 2329
Atlanta, Georgia 30308
(404) 730-3173 Ext 2160
akgolec@oig.usda.gov

Southeast Transportation Security Council
US Department of Agriculture OIG
SSA Ken Golec
404 West Peach Tree Street, Suite 2329
Atlanta, Georgia 30308
(404) 730-3173 Ext 2160
akgolec@oig.usda.gov

Tri-County Auto Theft Task Force
Inspector Don Draksler
20 West Washington Street
Joliet, Illinois 60432
(815) 727-5058
tricounty@willcosheriff.org

VIPER (Auto & Cargo) Task Force
Las Vegas Metropolitan Police Department
Lieutenant Robert Duvall
4750 West Oakey
Las Vegas, NV 89102
(702) 828-1966

Newark- FBI Interstate Theft Task Force
S.A. Michael Harpster
11 Center Place
Newark, New Jersey 07102
Michael.harpster@ic.fbi.gov
Fax (973) 792-3412

New Jersey State Police
Cargo Theft & Robbery Unit
Lieutenant Robert Collins
2667 Woodbridge Avenue
Edison, New Jersey 08817
(732) 548-7153
Lpd3618@gw.njsp.org
Fax (732) 494-2105

Waterfront Commission of NY and NJ
Major Case Squad
Captain Pete Massa
117 Tyler Street
Port Newark, New Jersey 07114
(973) 817-7798
pmassa@wcnyh.org
Fax (973) 817-8241

KAT-NET

Cargo Theft Task Force
John F. Kennedy Int'l Airport
FBI S/A Timothy Rembijas
80-02 KEW Gardens Road
11th Floor
Kew Gardens, New York 11415
(718) 286-7100 (718) 286-7195
No email
Fax (718) 286-7361

Suffolk County Police Department
Long Island New York
Robbery Bureau
Sergeant Al Feinstein
Detective Sergeant Stephen Jensen
30 Yaphank Avenue
Yaphank, New York 11980
(631) 852-6176
jenseste@suffolk ny.gov
Fax (631) 852-6820

FBI Interstate Theft Task Force
S.A. Mike Carbonnell
FB 1600 Arch Street, 8th Floor
Philadelphia, Pennsylvania 19106
(215) 418-4137
phillysquad10@hotmail.com
Fax (215) 418-4232

FBI

Duncan Edwards
Duncan.edwards@ic.fbi.gov
Fax (202) 324-1509

TAMCATS

Memphis Auto/Cargo Theft Task Force
Memphis Police Department
Lieutenant T.D. Jackson
51 South Flicker Street
Memphis, Tennessee 38104
(901) 327-5670
terence.jackson@memphistn.gov
Fax (901) 454-9609

Dallas Cargo Theft Unit
Dallas Police Department
Sergeant Louis Felini
725 North Jim Miller Road
Dallas, TX 75217
(214) 670-8345
lou.felini@dpd.dallascityhall.com
Fax (214) 670-8608

Operation Grafton, Heathrow Airport
London Metropolitan Police
Detective Superintendent Tony Moore
Detective Constable Arun Chandra-Bose
+44(0) 20 8246 9978
Intelligence Analyst Duncan Robertson
+44(0) 20 8246 9950

Operation Indicate, West Midlands
Detective Constable Steve Tolley
+44(0)12 1626 9121

INTERSTATE VERSUS INTRASTATE – IS THE BATTLE EVER OVER?

By: Dirk H. Beckwith and Robert E. McFarland

An attempt by the State of Michigan Department of Treasury to narrowly interpret the meaning of interstate commerce in the context of a state sales/use tax exemption for for interstate rolling stock was recently rebuffed in a unanimous published decision by the Michigan Court of Appeals in *Alvan Motor Freight, Inc v Department of Treasury*, 2008 WL 4365971. In that case, the Michigan Court of Appeals addressed two consolidated actions, one involving Alvan Motor Freight, Inc. (*"Alvan"*), and the other involving United Parcel Service, Inc. (*"UPS"*). At issue were sales/use tax exemptions for the carriers' rolling stock "used in interstate commerce" pursuant to MCL 205.94k(4), but which equipment did not physically leave the state.

In the *Alvan* case, the taxpayer contested an assessment from the Michigan Department of Treasury that certain of its power units utilized in its less-than-truckload operation were not entitled to exemptions under the Michigan Use Tax Act, MCL 205.91, *et seq.*, because such units operated wholly within the State of Michigan, even though they transported interstate freight on a regular and continuous basis. The Michigan Tax Tribunal affirmed the Department of Treasury position in rejecting Alvan's claim for the exemption, from which decision Alvan appealed. In the *UPS* case, on the other hand, the taxpayer successfully sought a refund in the Michigan Court of Claims of its use taxes on its delivery trucks that carried interstate freight but were operated entirely within the state of Michigan. The State then appealed the Court of Claims determination in favor of UPS. The Court of Appeals consolidated the two matters, involving as they did the same basic issue.

The Michigan Use Tax Statute provides an exemption for "rolling stock used in interstate commerce and purchased, rented or leased outside of this state by an interstate motor carrier . . ." at MCL 205.94k(2). Although the statute defines "interstate motor carrier" as an entity engaged in the business of carrying property "for hire across state lines, whose fleet mileage was driven at least 10% outside of this state in the immediately preceding tax year," the statute does not define "used in interstate commerce." The State did not contest that Alvan and UPS were "interstate motor carriers" that operated "rolling stock" in Michigan. The issue was whether that rolling stock was "used in interstate commerce" when the particular equipment at issue did not leave Michigan. Treasury took the position, consistent with its Internal Policy Directive ("IPD") 2003-1 that the trucks themselves must cross state lines for them to be employed in interstate commerce regardless of whether they were used to transport interstate freight within the State of Michigan.

Alvan and UPS contended that over a century of well-settled case law supported their position that transportation between two points in the same state could be interstate in nature regardless of whether a state line was crossed, pointing to the decision of the United States Supreme Court in *The Daniel Ball*, 77 US 557, 565; 19 L Ed 999 (1871), where a steamer plying Michigan's Grand River was deemed to be engaged in interstate commerce without leaving Michigan's boundaries as long as it carried goods or passengers originating from or destined to other states. The taxpayers cited a plethora of decisions in the rail, motor, and air context buttressing the position that the vessel or vehicle is "used in interstate commerce" when it carries goods in a continuous stream of commerce from one state to another, even when the instrument of transportation never leaves the particular state, including *Northern Pacific Railway Co v Washington*, 222 US 370; 32 S Ct 160; 56 L Ed 237 (1912) and *United States v Yellow Cab Co*, 332 US 218; 67 S Ct 1560; 91 L Ed 2010 (1947). Also noted were the spate of federal court affirmations of Interstate Commerce Commission decisions from the 1980s-1990s, determining the interstate character of freight movements conducted solely within the boundaries of a single state but consisting of movements which had an origin or destination outside of that state consistent with the shipper's intent such as *Middlewest Motor Freight Bureau v Interstate Commerce Commission*, 867 F2d 458 (8th Cir 1989); *Texas v United States*, 866 F2d 1546 (5th Cir 1989); *Central Freight Lines v Interstate Commerce Commission*, 899 F2d 413 (5th Cir 1990); and *California Trucking Association v Interstate Commerce Commission*, 900 F2d 208 (9th Cir 1990). Contrary to Michigan's contention that the commingled interstate/intrastate LTL operations of the taxpayers somehow tainted the nature of the interstate shipments, these cases supported the proposition that the rolling stock in question was operated in interstate commerce although utilized to also transport intrastate freight in mixed loads. The American Trucking Associations, Inc. filed an amicus brief in support of the taxpayers' positions.

Upon review, the Michigan Court of Appeals noted that the Legislature, when it drafted the statute in question, was capable of crafting language that required the crossing of state lines, but did not do so. The Court of Appeals further emphasized that the Legislature, under time-honored rules of statutory construction, was presumed to be fully aware of judicial decisions interpreting existing statutes. The Court of Appeals declared:

We hold that the only reasonable reading of the words "interstate commerce" as used in 1996 PA 447, as amended, is that the Legislature intended them to have the "peculiar and appropriate meaning in the law" that those words have acquired in over a century of judicial decisions applying the Commerce Clause of the United States Constitution.

Further, the Court concluded that dictionary definitions also supported the taxpayers' position as to the meaning of interstate commerce. The Court determined that the phrase "used in interstate commerce" is unambiguous. Contrary to Treasury's argument, the general principle that tax exemptions are strictly construed in favor of the taxing authority did not assist it when confronting the unambiguous meaning of the term "interstate commerce". The Court of Appeals also ruled that the Michigan Tax Tribunal had improperly relied upon an earlier Court of Appeals precedent in *Bob-Lo Co v Michigan Department of Treasury*, 112 Mich App 231; 315 NW2d 902 (1982) which concerned a use tax exemption for vessels engaged exclusively in interstate commerce, as opposed to rolling stock merely used in interstate commerce. The Tax Tribunal in Alvan had also improperly based its decision upon its policy directive IPD 2003-1, because "an agency's interpretation that is contrary to the statute's plain meaning is not controlling." In the appellate court's view, the IPD had erroneously conflated the two differing statutory prerequisites that the rolling stock must be "used in interstate commerce" and that the party claiming the exemption must be an "interstate motor carrier." Such an interpretation was not consistent with the plain meaning of the statute.

The decision of the Michigan Tax Tribunal was reversed accordingly in *Alvan*, and the determination of the Court of Claims was affirmed in *UPS*. Both carriers were entitled to the exemption for their rolling stock which transported interstate shipments, whether or not that rolling stock crossed the Michigan state line. The Department of Treasury elected not to seek leave to appeal the Court of Appeals ruling to the Michigan Supreme Court. The meaning of "interstate commerce" remains the same in Michigan as in other states, despite one state's attempt to fill its coffers by ignoring this time-honored definition.

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Email: jgibbs100@cfl.rr.com

POSITION WANTED: Experienced transportation and claims professional with extensive, multi-level personnel responsibilities and proven track record at all levels of work experience, seeking director or manager position in transportation or logistics.

Directed regional management staff, overseeing more than 140 individual operations in over 30 states.
Managed and directed the creation of numerous local and company-wide employee and management training programs.
Facilitated successful rollout and implementation of various programs simultaneously, at multiple venues company wide.
Results producer and team builder across all employee levels and demographics.
Managed and directed successful cargo claims processing unit with $15+ million annual payout.

Send requests for more information to TLP & SA, 155 Polifly Rd., Hackensack, NJ 07601 to the attention of Ed Loughman.

Do you need someone who is

KNOWLEDGEABLE IN CLAIMS AND/OR

TRANSPORTATION SECURITY?

Are you looking for a

POSITION WITH A CARRIER IN THE

FIELD OF LOSS PREVENTION?

If you are a member of the TLP & SA let us know and we will try to help you find someone or find a job!

NO CHARGE!

VISIT OUR WEBSITE!

WWW.TLPSA.ORG

Turn up the sound on your speakers

You will find:

- Bank of Experts
- Listings of our Officers and Staff
- Breaking Transportation News
- Member Roster
- Transportation Abbreviations
- Related web addresses
- All previous In Transit newsletters
- *NEW! Court Case Data Bank*

Check Out the Photo Gallery!

ADVERTISE

IN OUR NEWSLETTER!

ASK HOW! **732-350-3776** **ELOUGHMAN@NAKBLAW.COM**

Anyone who wishes to advertise in our **In Transit** *quarterly newsletter can do so by completing this form and sending it, along with a copy of your advertisement and your company check to: Ed Loughman, c/o TLP&SA, 155 Polifly Road, Hackensack, NJ 07601.*

Company Name: _____

Contact Name: _____

Company Address : _____

_____

_____

Telephone: ( ) _____

Fax: ( ) _____

E-mail: _____

AD RATES: $150.00 Business Card $250.00 Half page
$200.00 Quarter Page $350.00 Full page

If you are one of our EXHIBITORS, you pay half price for the ensuing year.

CSC

Cargo Salvage Claims

INCREASE YOUR SALVAGE RETURNS 100%

Inspections
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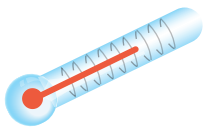
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Inspections, Reclamation, Inventory, Salvage Sales and Storage.

Donna Wyss
Salvage Specialist
cscsalesnet@earthlink.net

Toll Free: 800-654-7629 Phone: 317-781-9014 Fax: 317-781-1714

CCPAC Certified with: FDA

WEST BEND
A MUTUAL INSURANCE COMPANY™

Transportation Loss Prevention and Security Association, Inc.

155 Polifly Road - Hackensack, New Jersey 07601
Tel (732) 350-3776 OR (201) 343-5001 Fax (201) 343-5181
eloughman@nakblaw.com wbierman@nakblaw.com

EXHIBIT

at the 9th Annual Joint Conference of the TLP & SA and the TLC in St. Louis, Missouri – March 22 - 25, 2009

ONLY 3 MONTHS AWAY

The Transportation Loss Prevention and Security Association ***and the*** Transportation & Logistics Council will be hosting our Ninth Annual Joint Conference in St. Louis, Missouri!

Key decision-makers representing the transportation industry in the U.S.A., Canada, & Mexico will be assembled together on ***March 22, 2009*** through ***March 25, 2009*** at the Sheraton Westport Lakeside Chalet in St. Louis, Missouri.

Your company will have an unparalleled opportunity to reach a powerful segment of the transportation industry (shippers, truckers, 3PL's & Security), so ***'key'*** your exhibit toward all.

All but one exhibitor in the past years received an order for their product(s) from an attendee.

During the course of the conference, you will have the opportunity to reach hundreds of transportation professionals. These attendees are key decision-makers of their companies.
Here is an important way that your company can benefit from this upcoming conference:

Exhibit: The trade show provides an unparalleled opportunity to meet conference attendees. Sponsoring a booth will allow you to **interact with conference participants**, shake their hands, answer their questions and supply them with information about your products and services, ***write up an order!***

As an exhibitor, you will be in a prime position to **generate more leads** and achieve an excellent return on your marketing investment. There is no better time to get involved, and no better introduction for your company than participating in the March, 2009 Conference. **Exhibit, advertise...**it's easy, rewarding and profitable!

There are only 20 booths available and they will be given out 1st come 1st served.

If you have any questions, please do not hesitate to call Ed Loughman @ (732) 350-3776.
Ed will be more than happy to assist you. Thank you in advance for your support of the Transportation Loss Prevention and Security Association, and I look forward to meeting you in St. Louis.

William D. Bierman

William D. Bierman, Esq.
Executive Director, TLP & SA

TRANSPORTATION LOSS PREVENTION and SECURITY ASSOCIATION (TLP & SA)

APPLICATION FOR MEMBERSHIP

1. Name of Applicant: _____
   Last *Middle Initial* *First*

2. Affiliation: _____
   Indicate the company and position, or, if state or federal agency, the position held.

3. Other Information:

Office Address: _____

City: _____ State or Province: _____ Zip Code: _____

Office Telephone: (_____) _____ Office Fax: (_____) _____

E-mail: _____

I am involved in transportation through one or more of the following areas: (please check appropriate listing or listings).

____ Freight Claims ____ Labor/Human Resources ____ Rail ____ Logistics

____ Litigation ____ Motor Carrier ____ Maritime/Admiralty ____ Aviation

____ DOT/NTSB ____ Other _____
(please specify)

Please enclose payment with application form.

Transportation Loss Prevention and Security Association, Inc
c/o Nowell Amoroso Klein Bierman, P.A.
155 Polifly Road
Hackensack, New Jersey 07601

Please send completed application and payment to:

(732) 350-3776 (tel)
(201) 343-5181 (fax)
E-Mail: **WBierman@NAKBlaw.com**
Eloughman@nakblaw.com

William D. Bierman, Executive Director

Dues $450.00 per year per corporation

Your self-created password to our website _____

Date: _____ Signature of Applicant: _____