



# IN TRANSIT

Transportation Loss Prevention & Security Association

June 2004

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VISIT OUR WEBSITE  
[WWW.TLPSA.ORG](http://WWW.TLPSA.ORG)  
 (USE THE ADDRESS LINE TO ENTER)

### Transportation Loss Prevention and Security Association

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## Transportation Loss Prevention & Security Association

### Come Grow with Us

Another successful Annual Conference..... Excellent speakers and a full compliment of Exhibitors..... FedEx and ABF joins our Board of Directors..... TLP & SA files its Amicus Brief with the Supreme Court of the United States..... Expanding our Expert Bank..... More additions to our informative NEWSLETTER..... New members swelling our ranks..... We are growing by leaps and bounds.

What more can we have? **YOU!** Every new member and every new Company enriches us all.

TLP & SA is successful because our members want it to be. Our proactive Board of Directors is made up of leaders in the industry who seek to Educate, Benchmark and Network with their fellow professionals. Together we have strength and our voice can be heard in the industry as a whole, in Washington and in the Courts. We must be ready to respond to each new challenge and to represent the legitimate interests of our members.

### WON'T YOU GROW WITH US AND JOIN OUR RANKS TO PROMOTE A BETTER EDUCATED PROFESSION AND TO HELP MAKE YOUR VIEWS KNOWN?

INSIDE THIS NEWSLETTER YOU WILL FIND AN APPLICATION FOR MEMBERSHIP FORM. IF YOU ARE NOT A MEMBER OF OUR DYNAMIC GROUP AND WOULD LIKE TO JOIN, PLEASE FILL OUT THE FORM AND MAIL IT BACK TO US ASAP. IF YOU ARE ALREADY A MEMBER, PLEASE PASS THE FORM ALONG TO SOMEONE ELSE WHO MIGHT BENEFIT FROM MEMBERSHIP.

### Transportation Loss Prevention & Security Association, Inc. Officers - Directors and Staff

Daniel Saviola-Chairman  
 Yellow-Roadway Corp.

James Attridge, Esq. - Vice  
 Chairman  
 Scopelitis, Garvin, Light &  
 Hanson

John Gibbs - Director  
 Watkins Motor Lines, Inc.

Tom Rotunda-Treasurer  
 Yellow-Roadway Corp.

Martha J. Payne, Esq. -  
 Director  
 Law Offices of Martha J. Payne

Richard Lang - Director  
 ABF Freight System

Ken De Vries-Past Chairman  
 USF Holland Inc.

William D. Bierman, Esq.-  
 Executive Director  
 Nowell Amoroso Klein  
 Bierman, P.A.

Michael Willis - Director  
 Fed Ex Freight

Ernie Bengé - Director  
 Old Dominion Freight Line

Edward M. Loughman-  
 Assistant to the Executive  
 Director  
 TLP&SA

Moe Galante - Director  
 New Penn Motor Express

## **TRANSPORTATION LOSS PREVENTION & SECURITY ASSOCIATION HOLDS SUCCESSFUL ORLANDO MEETING**

By *Ed Loughman* - Assistant to the Executive Director of the TLP & SA

When many Trade Associations are floundering, the Transportation Loss Prevention & Security Association (TLP & SA) seems to be stronger than ever. Just under 300 industry representatives, attorneys and exhibitors met in Orlando, Florida on March 21, 2004 for the TLP & SA Annual Conference.

This unique Conference was held jointly with the Transportation Consumer Protection Council, Inc. (TCPC) at the Hotel Royal Plaza. William Bierman, Executive Director of TLP & SA and George Pezold, Executive Director of TCPC welcomed both carriers, shippers, security professionals and logistics personnel in the spirit of education and friendship.

Over two and a half days the attendees heard from leading trade press and industry representatives on loss prevention and security issues. Some of the highlights included a security presentation with spokespersons from the FBI, Florida Highway Patrol and Miami Dade Police Department as well as carrier security experts from Yellow-Roadway. Nationally known transportation attorneys participated in the annual session entitled "Law of the Land vs. Law of the Jungle" describing how it should be and how it is.



The gathering was treated to two popular keynote speeches. Tom Nabbe, a former Disney employee who started his career portraying Tom Sawyer at Disneyland in California told the transportation audience how he became head of logistics for Disney World. His pictures, taken as he grew up on the property, some with Walt Disney himself, enthralled the crowd of eager listeners.

On Tuesday, the attendees were treated to an unexpected patriotic address delivered by William Bierman, TLP & SA Executive Director. Bill spoke about a world of confusion as typified by his experiences on 9/11. He paid tribute to our fallen citizens and told stories about two brave truckers, Al Cayton who was killed in Iraq, and Ron Lantz who helped capture the Washington snipers. Bill intoned that "patriotism should not be a dirty word" and that "The U.S. is still the best place on earth we could ever want to be." After telling how he was moved by the opportunity to speak to new citizens and lead them in the Pledge of Allegiance on the day they were sworn in, Bill asked the audience to stand and recite the Pledge. He concluded by revealing, "My definition of citizenship is the hope that our country will experience all of its promise which is yet to come."

For further information on Transportation Loss Prevention & Security Association email [eloughman@nakblaw.com](mailto:eloughman@nakblaw.com) or call (201) 343-1652. WEBSITE- [www.tlpsa.org](http://www.tlpsa.org)

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## **TLP & SA ELECTS TWO NEW DIRECTORS**

The Board of Directors unanimously voted to appoint two new Directors to our board:

Richard Lang, Director of Customer Service at ABF Freight System

Michael Willis, Managing Director of Cargo Claims at FedEx Freight

# TLP & SA ELECTS OFFICERS AT ANNUAL MEETING

William Bierman, Executive Director of the Transportation Loss Prevention & Security Association, announced the election of officers at the Association's Annual Conference at the Hotel Royal Plaza in Orlando Florida on March 21, 2004.

TLP & SA is an organization dedicated to providing loss prevention and security education and legal/legislative advocacy to its carrier members.

The slate of officers unanimously re-elected were:

Chairman - Daniel Saviola of Yellow-Roadway Enterprise

Vice-Chairman - James Attridge, Esq. of Scopelitis, Garvin, Light & Hanson

Treasurer - Tom Rotunda of Yellow-Roadway Enterprise

The educational Conference was held over three days in conjunction with the Transportation Consumer Protection Council, Inc.

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## MEMBERSHIP ADDITIONS

The TLP & SA wishes to welcome three new members:

Bob Alburger - A. Duie Pyle, Inc. - West Chester, PA

Wesley S. Chused - Looney & Grossman, LLP - Boston, MA

Tammy Warn - Interstate Distributor Co. - Tacoma, WA

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## JOIN THE CHORUS

**Our voice will be louder with your participation on our team, so give us a "holler"!**

By joining the Transportation Loss Prevention & Security Association (TLP & SA), you will immediately help the transportation industry, your corporation and yourself. Aside from the comradery you will gain with your colleagues, you will receive our quarterly Newsletter, assistance with cargo claims, E-mail alerts, our list of experts, access to the secure section of our website and legal and legislative advocacy.

Each year we have a Joint Educational Conference with TCPC where we hear from top experts in the transportation industry. Topics such as loss prevention, security, contracts and current legal trends are all reviewed in an understandable and practical manner with an eye toward saving your company money. The Conference with a leading shipper's organization helps us meet and understand our customers, and provides a forum, which promotes business opportunities.

Why any freight carrier, transportation vendor, cargo logistics firm, transportation law firm, insurance firm, etc. would not join the TLP & SA is beyond us. We are a non-profit industry trade association, which is why our annual dues are only \$450.00 per company (and that amounts to less than \$1.25 per diem). We believe that membership in the TLP & SA will save your company many times that amount in a single year. Give us a try and see how many voices make a louder and sweeter sound!

**FILL OUT THE ENCLOSED APPLICATION AND SEND IT TO US ASAP, SO WE CAN ADD YOUR VOICE TO THE CHORUS.**

# BOARD OF DIRECTOR'S AWARD TO DE VRIES

The Officers and the Board of Directors of TLP & SA presented the 2004 SPECIAL BOARD OF DIRECTORS AWARD to past Chairman Ken DeVries of USF Holland, Inc. at the TLP & SA Annual Conference in Orlando , Florida.

Executive Director of TLP & SA, William Bierman, said that "the award was given to an outstanding member of the organization who had demonstrated leadership above and beyond the call of duty". Bierman went on to observe, "This award recognizes an individual who has devoted enormous effort to our Association as well as the transportation industry as a whole".

The award reads:

FOR EXEMPLARY PROFESSIONALISM, ACHIEVEMENT AND CONTRIBUTION TO THE ASSOCIATION AND IT'S MEMBERSHIP AS THE FIRST CHAIRMAN OF TLP & SA DURING A TIME OF TRANSITION AND UNIQUE CHALLENGES.

This award was well deserved as Ken served two terms as Chairman at the time TLP & SA became an independent organization and he helped keep the group together as it progressed and took its place as a nationally respected Association.





Bill Bierman - Executive Director TLP & SA



Bill Bierman (Nowell, Amoroso, Klein & Bierman, P.A.),  
Ed Loughman (TLP & SA) & Moe Galante ( New Penn Motor Express)



Dan Saviola - Chairman TLP & SA (Yellow-Roadway)



Jerry Smith - Augello, Pezold & Hirschmann, LLP



Dan Bolzenius (Sysco Corp.), Robert Gleason (Freight Traffic Management),  
James Cooke(Logistics Management), Bill Bierman (TLP&SA), Bill Taylor  
(Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP), Bob Voltmann (Executive  
Director, TIA



Bill Taylor  
Hanson, Bridgett  
Marcus, Vlahos  
& Rudy, LLP)      Bill Bierman, &  
TLP & SA      Bob Voltmann  
Executive Director - TIA

# HOW ABOUT THOSE EXHIBITORS?

Red, White and Blue were the colors on display at the TLP & SA Exhibition Hall in Orlando, Florida at our Annual Conference. As the attendees took their coffee breaks, they were treated to industry related vendors who provided a direct insight into their newest items. Our knowledgeable Exhibitors were quick to explain the intricacies of their wares and how those products help secure goods or to mitigate damages.

It is always exiting to actually see these products up close and personal and to receive promotional material that we can use all year long. Some carriers and shippers said that they will never run out of writing pads and key chains.

The response from the Exhibitors was equally gratifying. They felt that once they had an opportunity to show off their products, sales increased and long term relationships were formed. Our Exhibitors said they are already looking forward to next year in San Diego.

IF ANYONE KNOWS A VENDOR WHO WOULD LIKE TO EXHIBIT NEXT YEAR IN SAN DIEGO, PLEASE HAVE THEM CONTACT ED LOUGHMAN AND HE WILL SET IT UP. BELIEVE ME, YOU ARE DOING THE VENDORS A FAVOR.

## HERE IS THE LIST OF OUR ORLANDO EXHIBITORS

American Recovery Systems, Inc.  
[Rbowen@arscollection.com](mailto:Rbowen@arscollection.com)

Best Loading Services  
[Blsmorton@aol.com](mailto:Blsmorton@aol.com)

Centerload Shipping Technologies  
[mcaires@centerload.com](mailto:mcaires@centerload.com)

Lock America, Inc.  
[Cshope@laigroup.com](mailto:Cshope@laigroup.com)

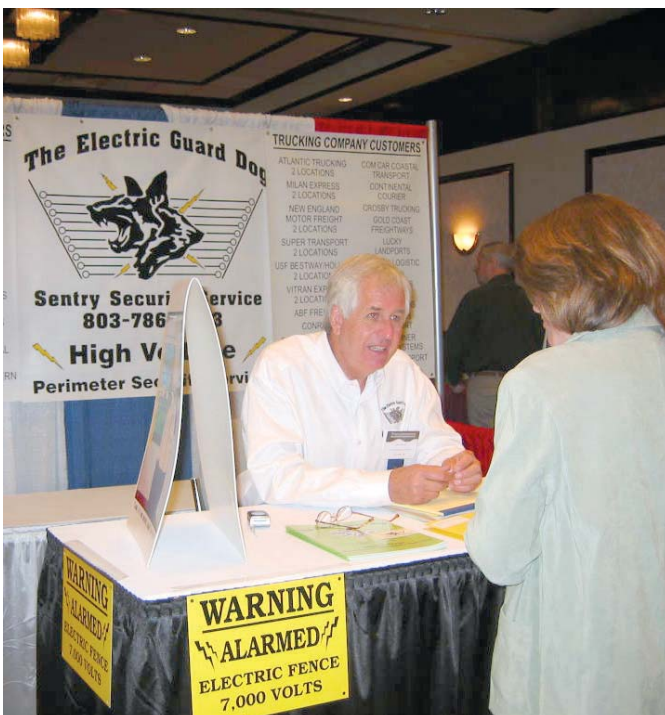
O-Sales & Leasing, LLC.  
[jodonnell@qsales.com](mailto:jodonnell@qsales.com)

Recovery Management Corp.  
[dpack@reccorp.com](mailto:dpack@reccorp.com)

Sentry Dogs of Columbia  
[Sentry@electricguarddog.com](mailto:Sentry@electricguarddog.com)

Smart Interactive Systems, Inc.  
[Rcrowe@smartinteractive.com](mailto:Rcrowe@smartinteractive.com)

Winston Scientific Consultants, LLC  
[Winlab1@aol.com](mailto:Winlab1@aol.com)



# WILL A CONTRACT SOLVE ALL MY TRANSPORTATION PROBLEMS?

By William D. Bierman, Esq.

CONTRACTS--CONTRACTS--CONTRACTS. Is that the magic pill, which insulates carriers and shippers from all harm? Well like most beneficial medicine, you must carefully read the label and avoid excessive use. And to follow the analogy, you must have a knowledgeable doctor who knows how to prescribe.

## UNIQUE CONTRACTS

Transportation Contracts are unique. They are creatures of federal statutes. The Interstate Commerce Commission Termination Act of 1995 (ICCTA) pursuant to 49 USC section 14101 (b) authorizes a carrier to enter into a contract with a shipper other than for the movement of household goods. That same section allows the parties to expressly waive in writing any and all rights and remedies under ICCTA which might otherwise govern the transportation covered by the contract. The only provisions that cannot be waived are those governing registration, insurance, or safety fitness. It should be noted that ICCTA does not provide for a separate category of "contract carriers" nor does it issue contract carrier licenses. Any authorized carrier can enter into a federally permitted contract. See 49 USC section 13102 (12).

**Any authorized carrier can enter into a federally permitted contract. See 49 USC section 13102**

Now that you know the law permits you to have a contract, does that solve all your transportation problems? Of course not. That is like saying that any contract eliminates all controversy between the parties to it. The ability to have a contract merely triggers addi-

tional questions to be considered in order to memorialize the true agreement which the parties seek

## WHAT GOES INTO THE CONTRACT?

There is a famous observation that those who do not know history are condemned to repeat it. The same can be said with regard to transportation contracts. A sound transportation contract must take into consideration both the reasonable expectations of the parties as well as the potential problems that may arise in the ordinary course of shipment. To do this in

**A sound transportation contract must take into consideration both the reasonable expectations of the parties as well as the potential problems that may arise in the ordinary course of shipment.**

a business like manner one must have a grasp of the industry as well as what has gone on before deregulation.

## CONTRACT vs. BILL OF LADING

Most knowledgeable professionals know that the bill of lading has always been referred to as the "contract of carriage" and this is a good place to start since a transportation contract seeks to alter, amend or entirely replace the bill of lading. So the first area of inquiry would be what does one wish to change about the bill of lading. If there is nothing of significance that one wishes to change, perhaps a contract is unnecessary. Remember, the so-called uniform bill of lading had been agreed to by both carriers and shippers through their

respective trade organizations and had been included in Freight Classifications previously filed with the Interstate Commerce Commission.

**When seeking to "scrap" the bill of lading, both carriers and shippers should be prepared to substitute procedures which will address all the elements of the uniform bill of lading so as not to put the parties in a worse position than they would have been if the uniform bill of lading were used.**

Therefore, many practical requirements and procedures are contained in the bill of lading.

When seeking to "scrap" the bill of lading, both carriers and shippers should be prepared to substitute procedures which will address all the elements of the uniform bill of lading so as not to put the parties in a worse position than they would have been if the uniform bill of lading were used. At the very least, a new contract should provide what happens if a bill of lading with all its contractual language is employed in conjunction with such a new contract. Will the new contract completely supercede the bill of lading, will the new contract incorporate any of the bill of lading provisions, will the bill of lading merely act as a receipt for the goods and nothing more?

## ANTICIPATING PROBLEMS

As one can begin to see, while contracting may be a great new privilege,

it comes with substantial responsibilities. The representatives of the companies making the contract must address both the legal and practical issues if the contract is to be successful. Remember, prior to the ability to contract, a shipment was governed by a bill of lading together with documents incorporated by reference such as tariffs and classifications. Therefore, contracting parties must now consider whether any of the potential items covered in prior documents should be addressed in the new contract. Failing to undergo such an exercise may leave your company vulnerable to a law suit or at least an arbitration wherein someone else can tell you what you thought you meant!

Having said all that, the benefit of a well drafted contract is to enable the parties to anticipate and provide for problems before they happen and to tailor a relationship to fit the individual needs of the parties. Therefore, it is essential to spend substantial time with your transportation attorney to decide not only what items you want in your agreement, but also what items you need in your agreement to cover those incidents that may occur. To do this one must take into consideration all of the areas covered by the uniform bill of lading as well as those issues contained in general tariffs and classifications. While this is not a sim-

**A contract will only solve the transportation problems that one has anticipated and planned for.**

ple task, one must ask how the parties would handle an issue that was not provided for in the contract. Therefore, the answer to the question will a contract solve all my transportation problems is that a contract will only solve the transportation problems that one has anticipated and planned for.

## WHAT CONTRACT ISSUES HAVE YOU CONSIDERED?

In an attempt to give the careful transportation professional an idea of the many issues to be considered, we have provided a list of just some of the often forgotten items that one may wish to review before finalizing the transportation contract. This list serves to make

**When one drafts a contract which takes the place of a bill of lading, tariffs and classifications, one must take into consideration the many situations which may be left uncovered unless the parties provide for them.**

the point that when one drafts a contract which takes the place of a bill of

lading, tariffs and classifications, one must take into consideration the many situations which may be left uncovered unless the parties provide for them. Your contract can only solve the problems that have been anticipated and addressed. Otherwise, one may face litigation that may unneces-

sarily affect a previously profitable business relationship.

### CONTRACT OF CARRIAGE TERMS TO CONSIDER

1. ACCESSORIAL CHARGES
2. ARBITRATION OR ADR CLAUSE
3. CLAIMS RULES
4. C.O.D.
5. CONFIDENTIALITY
6. CONSTRUCTIVE NOTICE
7. CONTROL OF OPERATIONS
8. CREDIT PROVISIONS
9. DEDUCTIBLES
10. DESCRIPTION OF COMMODITIES ALLOWED
11. ENVIRONMENTAL ISSUES AND INSURANCE
12. FINANCIAL DISCLOSURE
13. FORCE MAJEURE CLAUSE
14. GOVERNMENT REGULATIONS
15. HAZARDOUS MATERIALS AND INSURANCE
16. INCORPORATION BY REFERENCE
17. INDEMNIFICATION / HOLD HARMLESS CLAUSE
18. INSURANCE
19. LIABILITY
20. LIENS ON GOODS
21. LOCK-IN RATE OR TIME (RISING COSTS)
22. MEET LOWER RATE CLAUSE
23. ON HAND RULES & SALE
24. PACKAGING
25. PENALTIES / BONUS
26. PRICE - RATES
27. REASONABLE DISPATCH
28. RELEASED RATES / INADVERTENCE CLAUSE
29. SALVAGE
30. SHIPPING DOCS (B/L TERMS)
31. SPECIAL EQUIPMENT
32. SPECIAL SERVICES
33. SUBSTITUTED SERVICES
34. TARIFFS & RULES
35. TERM
36. TIME LIMITS (NOTICE & SUIT)
37. UNDERCHARGES / OVERCHARGES
38. UPDATE PROVISIONS
39. VALUE CLAUSE / ACTUAL AND EXTRAORDINARY
40. VOLUME OBLIGATIONS
41. WHAT LAW GOVERNS



# SECURITY INSIGHT:

By John Tabor, Director of Security for National Retail Systems, Inc. and member of the TLP & SA.

## BACKGROUNDS - THE BACKBONE OF A LOSS PREVENTION PROGRAM

I recently read an article complaining about how our industry has been inundated with September 12th Security experts. Every vendor has the new, unbeatable, foolproof method

**As I traveled I-95 in New Jersey to work every morning I see that at least 40% of trailers are not locked while in transit. I have to believe that this negligence is due to operational budgetary constraints.**

for securing your supply chain. It is clear that now Security professionals have been brainwashed into focusing their efforts on defending our homeland from the next Weapon of Mass Destruction. I speak at various industry events and I too start my presentation with a photo taken from my office, of the towers, moments after the first plane hit. From the moment that attack happened, our industry was pulled to the forefront and now we must be prepared to recognize, and react to the next attack upon America. That is a heavy burden to throw on a group of people who 2 years earlier were probably fighting to get their guards an extra \$.50 an hour to help with turnover problems. As I travel I-95 in New Jersey to work every morning I see that at least 40% of trailers are not locked while in tran-

sit. I have to believe that this negligence is due to operational budgetary constraints. If that is the fact, how can we expect our industry to pour millions of dollars into technology when we cannot even afford 15-dollar locks? How do we begin to shoulder this burden that we now carry?

I like to believe that in my organization there is no new burden. For several years we have had policies and procedures in place that limit our exposure to cargo thieves (our real enemy) and the losses that they cause. I do not know of a Security professional who believes that any one device can eliminate cargo theft, be it a \$2,000 GPS tracking device or a \$.20 seal. Almost any device could be defeated in time, or bypassed for another form of entry into your warehouse, container or trailer. Please understand that we utilize many of today's current technologies, CCTV coupled with digital video recorders, Micro phonic cable detection and microwave alarms for our fences, Satellite and cell phone communication with our drivers, untethered GPS systems for our trailers and stringent lock and seal policies. I firmly believe that we get the most "bang for our buck" though from any money invested in prevention.

## HIRE THE RIGHT PEOPLE

Prevention starts with hiring the right people. We perform drug testing, pre-

vious employment checks, address verification, criminal checks, etc. I feel in that regard we are no different than any other trucking organization in America. We are different in a couple of key areas however. I make the final decision whether or not we hire a driver. If I were an Operations Manager, and I had 2 "hot" loads that had to go from the west coast back east, the first 2 drivers that applied would be "the most qualified", it is just human nature. I work directly for the owners and have no ties to our operational divisions. This affords me the ability to view an applicant with an unbiased eye.

## IF I WERE A CAREER CARGO THIEF

If I were a career cargo thief, or terrorist for that matter, I would have learned by now that the trucking industry on a whole performs criminal checks. I probably would also know that most organizations only run countywide criminal checks due to budgetary concerns. If I were applying for a job in the trucking business after being arrested I would make sure to have my residence outside of the county in which I committed my crimes in. I would list references that I was sure would not have anything bad to say about me and would not share my last name. Thieves know not to list relatives as references, so when we do an in-depth background check we find they do list cousins or in-laws.

## USE THE INTERNET

It is the next level of investigation that weeds out our potential problems. Utilizing the Internet and websites like Knowx and Accurint for a total of \$4.50 I can tell you the following.

- Your name, DOB, social security number.....If you've had any bankruptcies.
- Your current home address.....Any homes and motor vehicles you owned.
- All of your previous home addresses.....Your families name and addresses.
- People who live at your address.....Your neighbors name and addresses.

I can verify all of these with one of these simple reports.

After we began deeper research on our applicants we found a 37% increase in the number of "hits" or criminal convictions found. That number is significant for many reasons if you adhere to my theory that 1 out of every 2 cargo thefts has some level of employee involvement. For every 100 people that I now hire, 37 less potential problems are getting in my door. I am also probably hiring 37 more peo-

**If budget constraints left me with the option of only one item to build my Loss Prevention program around, it would be on investigating those people who will be responsible for putting the rubber to the road.**

ple who are more likely to follow our strict policies and procedures without trying to find a way to circumvent them for their personal gain.

With insurance prices rising, fuel prices rising, wages rising, and the inevitable costs involved in federal initiatives like CSI and CTPAT, while profit margins tighten and the labor force is reduced by the new hours of service regulations, we will only be faced with tougher decisions on what technologies we should employ.

## **INVESTIGATION PAYS OFF**

All of the technologies I mentioned earlier have proven themselves useful for my organization. It does not take a so-called "expert" to reduce your exposure to cargo theft and terrorism at the same time. If budget constraints left me with the option of only one item to build my Loss Prevention program around, it would be on investigating those people who will be responsible for putting the rubber to the road.

# **FREIGHT LOSS AND DAMAGE CASES (SPRING 2004)**

*Case summaries submitted by Wesley S. Chused, Esq. - Looney & Grossman, LLP - Boston, Massachusetts*

***Celadon Trucking Services, Inc. v. Titan Textile Company, Inc.***, 2004 Tex. App. LEXIS 1409 (Court of Appeals of Texas 2004). This decision by the Court of Appeals of Texas is instructive for all motor carriers who have contracts with shippers: form does matter over

**the Court of Appeals of Texas held that, although the Carmack Amendment includes provisions that permit a shipper to "expressly waive" any or all of its rights and remedies, the contract between Celadon and Titan contained no such express language.**

substance. The defendant motor carrier, Celadon, had a contract with the plaintiff shipper, Titan, providing that Celadon's liability would be "zero" for losses occurring in Mexico. In this case, Celadon picked up a shipment of yarn in South Carolina consigned for delivery on a through bill of lading to Mexico City. The goods were stolen in Mexico and Titan recovered a judgment of \$33,000 against Celadon for its loss. In overruling Celadon's appeal, the Court of Appeals of Texas held that, although the Carmack Amendment includes provisions that permit a shipper to "expressly waive" any or all of its rights and remedies, the contract between Celadon and Titan contained no such express language, and, therefore, the shipper had not waived its rights under the Carmack Amendment. The Court rejected Celadon's argument that the

language in the contract providing that its liability would be "zero" for losses occurring in Mexico was sufficient to constitute Titan's express waiver of its rights as required under the statute. The court also rejected Celadon's second argument that, even under the Carmack Amendment, it had properly limited its liability to "zero," reasoning that there was no evidence in the record that Celadon had presented Titan with different rate levels from which to choose. The court also rejected Celadon's contention that Titan was an experienced, sophisticated shipper, finding that there was no evidence submitted at trial to support that argument.

***Rational Software Corp. v. Sterling Corp.***, \_\_\_ F. Supp. 2d. \_\_\_; 2004 U.S. Dist. LEXIS 5234 (D. Mass. 2004). In this case, tried in the U.S. District Court in Massachusetts, the Court upheld a motor carrier's released rate limitation in its bill of lading on an intrastate shipment through application of the Uniform Commercial Code. The plaintiff/shipper, Rational, had been doing business with the defendant/carrier, Sterling, for several years under a written contract. The evidence at trial showed that, prior to the

**The court also rejected Celadon's contention that Titan was an experienced, sophisticated shipper, finding that there was no evidence submitted at trial to support that argument.**

shipment in question, Sterling had

transported over 200 previous shipments, all using the same type of bill of lading that provided, in bold red print on the front, as follows:

“Unless a Different Value Is Declared, the Shipper Hereby Releases the Property to a Value of \$.60 Per Pound Per Article.”

In this instance, involving an interplant move, Sterling picked up a shipment of computer equipment, without issuing a bill of lading, and its employees dropped the equipment during the unloaded process at destination, totally destroying it. Rational was paid \$250,000 for the loss by its insurance company, which then pursued a subrogation lawsuit against Sterling. The evidence at trial showed that although no bill of lading was issued at origin by Sterling, after the accident Rational’s employee signed the “Delivery Acknowledgement” section of the bill of lading as “damaged” but he did not insert or declare any valuation, although he could have. Similarly, on none of the over 200 previous shipments had Rational ever declared a value on any of those bills of lading. Rational’s representative testified that he thought Sterling used the bill of lading only as a means to record time for billing purposes and that Sterling nonetheless would be “responsible” for any damages caused

**The court found that Sterling’s rates were dependent on value within the meaning of the statute, and that Rational had been given ample opportunity to declare a value higher than 60 cents per pound for the shipment.**

by its own employee’s negligence. In rejecting Rational’s arguments and upholding Sterling’s bill of lading (60 cents) limitation, the trial court cited to

the Uniform Commercial Code, which permits damages to be limited if the shipper is given an opportunity to declare a higher value, on an intrastate shipment. The court found that Sterling’s rates were dependent on value within the meaning of the statute, and that Rational had been given ample opportunity to declare a value higher than 60 cents per pound for the shipment. The court noted several interstate released rate cases and held the plaintiff bound by the terms of the bill of lading even though it was not signed until after the fact. [N.B. This case is now pending on appeal.]

*Great American Insurance Agency v. United Parcel Service*, 2004 N.Y. Misc. LEXIS 34 (Supreme Court of New York 2004). This case involved a shipment of jewelry lost in transit for which the plaintiff paid its insured over \$18,000 and then sought subrogation against the defendant carrier, UPS. UPS moved for summary judgment because suit was commenced more than two years after the loss was discovered and more than two years after the disputed notice of disallowance of the claim was sent out. After summarizing the applicable provisions of the Carmack Amendment and the ICCTA, and recognizing that the filed rate doctrine no longer exists, the court turned its attention to the provisions of UPS’s unfiled 1998 tariff, which provided:

“Suits shall be instituted against U.P.S. . . . within two years after discovery by the shipper . . . of the occurrence

**the court ruled that UPS’s 1998 tariff provision was impermissibly shorter than the Carmack Amendment’s minimum threshold of two years after a notice of disallowance of a claim.**

which gives rise to the claim.”

In denying UPS’s motion for summary judgment, the court ruled that UPS’s 1998 tariff provision was impermissibly shorter than the Carmack Amendment’s minimum threshold of two years after a notice of disallowance of a claim. The court was obviously affected by the fact that UPS’s bill of lading did not make reference to a particular UPS tariff, and by the fact that UPS had failed to submit evidence of the shipper’s experience.

*Dials v. Watts Brothers Moving & Storage Systems, Inc.*, \_\_\_ F. Supp. 2d. \_\_\_, 2003 U.S. Dist. LEXIS 21413 (E.D. Ohio 2003). Although this case involved an interstate household goods shipment, it is, nonetheless, instructive and helpful to all interstate motor carriers that receive shipments from warehousemen. In *Dials*, the defendant van line received an interstate shipment from a co-defendant storage facility/warehouseman and transported it from Kentucky to West Virginia. Following delivery of the shipment, the plaintiffs filed a \$113,000 freight loss and damage claim against both the warehouseman and the van line. The van line had issued its standard interstate bill of lading that included a nine-month claim filing provision, and on summary judgment it argued that the plaintiffs’ claim was barred because they had failed to file a timely written claim. The plaintiffs attempted to avoid summary judgment by arguing that they had substantially complied with the FMCSA’s claim filing regulations by signing the household goods descriptive inventories and noting exceptions at destination. The court rejected that argument, citing the claim filing requirements of 49 CFR §370. Significantly, the court also rejected the plaintiffs’ argument that by filing a claim with the defendant warehouseman, that constituted sufficient notice to the interstate van line. The court noted that the van line was not a connecting carrier, in the agreement

between the plaintiffs and the warehouseman, and that the plaintiffs did not contract with the van line until approximately a year after the shipment went into storage in West Virginia. The court ruled that "it is clear . . . that there were two separate and distinct shipping contracts under two separate and distinct bills of lading," and held that the plaintiffs failed in their responsibility to file a timely written loss and damage claim with the van line within nine months after delivery.

**The court ... held that the plaintiffs failed in their responsibility to file a timely written loss and damage claim with the van line within nine months after delivery.**

*United States Aviation Underwriters, Inc. v. Yellow Freight System, Inc.*, 296 F. Supp. 2d. 1332 (D. Ala. 2003). This case involved a damage claim that arose from the transportation of an airplane engine from Alabama to West Virginia. The evidence showed that the engine was in good condition at origin, properly bolted, skidded and packaged in its shipping container, and was delivered by the defendant motor carrier intact and undamaged at destination. There were no damage exceptions taken at destination by the consignee. The receiving clerk did a visual check for any obvious damage but did not note any. The next day, after the machine had been moved to another area of the consignee's facility, another employee of the consignee observed "obvious" damage. The cost of repairing the damage was over \$87,000, which was paid by the shipper's insurance company who then subrogated against the defendant motor carrier. Both parties filed cross-motions for summary judgment. In this lengthy, but very interesting and colorful decision, the U.S. District judge in Alabama, ruling on cross

motions for summary judgment by shipper and carrier, addressed a number of evidentiary issues and burdens of proof. Although the court allowed the motor carrier's motion for summary judgment and dismissed the plaintiff's state law claims on grounds of Carmack Amendment preemption, the

**the court allowed the motor carrier's motion for summary judgement and dismissed the plaintiff's state law claims on grounds of Carmack Amendment preemption**

court nonetheless denied both parties' motions insofar as the case presented a Carmack Amendment claim. The court found that questions remained as to whether the engine arrived in a damaged condition notwithstanding the clear delivery receipt. The court was concerned over issues and questions about the receiving clerk's visual inspection of the engine at the time of delivery and noted that there were a number of unanswered questions concerning how the shipment was handled (char-

**The court also rejected the defendant carrier's argument that it was entitled to the benefit of the shipper's insurance under the terms and conditions of the Uniform Straight Bill of Lading.**

acterized by the court as a "black hole of evidence"). The court also rejected the defendant carrier's argument that it was entitled to the benefit of the shipper's insurance under the terms and conditions of the Uniform Straight Bill of Lading.



# New Supreme Court Ruling on NAFTA (North American Free Trade Agreement) brings Happy Days to Mexican truckers:

By Gordon D. McAuley, Esq. - Co-Chair TLA Freight Claims Committee (Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP).

You undoubtedly have read the media reports of the U.S. Supreme Court's decision on June 7, 2004 in *D.O.T. v. Public Citizen*, 541 U.S. \_\_\_\_ (2004). Well, we actually read the decision! You may recall that the Mexican trucks were supposed to begin crossing the U.S. border in 1996, but procedural wranglings by labor and environmental groups provided road-blocks to the President's desire to comply with the NAFTA treaty, which was passed by Congress and effective in 1994. The decision is arcane due to its basis in federal statutory environmental law but its holding may be distilled into a simple tenet: The Federal Motor Carrier Safety Administration is

gated by the FMCSA could preclude the President from making that determination or effecting that result.

The petitioners had argued that the FMCSA improperly issued an Environmental Assessment and a

tions. The U.S. Supreme Court found that any increase in traffic would be an effect of the President requiring that NAFTA be implemented: not the enforcement of FMCSA's safety regulations. Under these circumstances the FMCSA was not required to consider the environmental impact of increased Mexican truck traffic into the U.S., but only the effect of its safety monitoring regulations. Any increase in cross-border traffic would not be the result of its regulations. Indeed, the FMCSA has no authority to grant or deny access across the border; other than to issue permits to qualified carriers.

The decision will not have a dramatic impact on

not an environmental enforcement agency. It does not have the authority to restrict the operation of Mexican trucks in the U.S. simply because they might pollute the U.S. air. The FMCSA's authority is limited by statute to registration of motor carriers, compelling financial responsibility of carriers, and promoting safety regulations. It does not have authority to prevent otherwise qualified Mexican motor carriers from operating in the U.S. based on environmental impact. It was the President who authorized the cancellation of the pre-NAFTA moratorium on entry of Mexican trucks into the U.S. No safety regulation promul-

FONSI (Finding of No Significant Impact) [and, hence, the reason for the lame Happy Days reference above] regarding its promulgation of safety monitoring regulations pertaining to the entry of Mexican trucks into the U.S. FMCSA found its safety regulations, which would require roadside inspections of the Mexican trucks on entry into the U.S., would not appreciably increase pollution in the U.S. The petitioners argued that the increase in cross-border traffic was an effect of the FMCSA safety rules, and that FMCSA should have prepared a full Environmental Impact Statement of the pollution effects of its regula-

the date that the trucks start rolling across the border. The FMCSA already was preparing the burdensome Environmental Impact Statement as the result of lower court rulings, and it was almost completed. There now appears to be few legal barriers to Mexican trucking companies from fulfilling the promise of NAFTA. Happy Days indeed for our Southern neighbors.



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E-Mail: [WBierman@nakblaw.com](mailto:WBierman@nakblaw.com)  
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