



# IN TRANSIT

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### MEMBERSHIP ALERT

tick...tick...tick The time is coming fast. Are these dates on your calendar?

#### APRIL 8 - 10, 2002 TLP&SA JOINT CONFERENCE

**ADAM'S MARK HOTELS & RESORTS  
ORLANDO, FLORIDA**

You will soon be receiving your personal invitation and Brochure detailing a Conference chock full of information and education. In addition, the networking alone will be worth more than the price of admission. At the Conference, you will get a chance to see distinguished members of the Trade Press get out from behind their computers and give their opinions on the Future of the Motor Carrier Industry. You will get a chance to share the vision of one of the most influential people in the transportation industry as MIKE WICKHAM, Chairman and CEO of Roadway, tells us what he thinks of current events.

Lawyers wrangle about cases affecting your everyday business life. Security/Loss Prevention will be reviewed in light of our new security conscious society. Insurance and 3PL's will be discussed. Workshops on Bills of Lading and the Internet will be conducted by experts. You can't afford to miss it!

MORE...MORE...MORE. You say you're not satisfied? There will be RECEPTIONS, HOSPITALITY, DOOR PRIZES and you may even get a chance to meet the MOUSE if we can make a special arrangement with Disney World. And to top it all off, we will have EXHIBITS which will provide an up close and personal opportunity to work with some of the top VENDORS in our industry.

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Loss Prevention and  
Security Association**

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**TLP&SA ESTABLISHES TIES WITH THE TRANSPORTATION POLICY INSTITUTE AT RUTGERS UNIVERSITY**

Rutgers University sponsors the Transportation Policy Institute (TPI) in the Edward J. Bloustein School of Planning and Public Policy. The Institute is a unit of the Alan M. Voorhees Transportation Center. TPI addresses issues of concern to the transportation industry.

Recently, the Voorhees Transportation Center prepared a seminal study on THE VALUE OF FREIGHT: Improving the Visibility of Freight and Enhancing Economic Vitality. This study will form the centerpiece of a symposium entitled "Freight Mobility Partnership". The symposium, to be held at Rutgers University in New Brunswick, New Jersey, will bring together representatives from government, prominent shippers and carriers as well as recognized scholars who have studied and published works on the transportation industry as part of their academic career.

Several months ago, your Executive Director was asked to become a member of the Advisory Committee of the Voorhees Transportation Center and to take charge of this important symposium. The Advisory Committee is made up of well respected transportation leaders as well as political figures with a background in transportation. We have two former Governors, a former U.S. Senator, two former Commissioners of the Department of Transportation, the former Chairman of the Port Authority of New York and New

Jersey, as well as Jon Shevell, Vice Chairman and Executive Vice President of New England Motor Freight, Inc. The Chairman of the Advisory Board is Arthur E. Imperatore, Jr., President and Chief Executive Officer of NY Waterway. As most of you may know, Arthur's father, Arthur, Sr., was the founder of APA Transport Corporation.

The connection with the Voorhees Transportation Center will prove very beneficial to our Association since I have been able to demonstrate to the Advisory Board the importance of freight and they have decided to make the handling and movement of freight an important area of concentration. I will soon be recommending to our Board that we take a visible role at the Voorhees Center. Who better than the TLP&SA and our members to provide information and guidance when it comes to the handling and moving of freight! I have had a very favorable reaction from Rutgers as to the possibility of working closely with TLP&SA.

I will keep you advised as to this exciting opportunity.

**EXHIBITS**

I have been getting many calls from VENDORS and other industry related companies inquiring about Exhibit space at the Conference. Space is going quickly and we anticipate a large number of attendees. Our Director, John Gibbs of Southeastern Freight Lines, is handling the Exhibit space. I suggest that you call John ASAP at (800) 637-7335 to arrange for Exhibit space. You will be sorry if you pass up this chance to be seen by industry attendees who can buy your product.

**TLP&SA POSTER PROGRAM WORKS!**

Studies conclude that POSTERS, used together with a comprehensive loss prevention program, pay big dividends. With this in mind, TLP&SA has made LOSS PREVENTION POSTERS available to our membership for a fraction of the cost to produce your own posters! The POSTERS can be ordered in sets of twelve (12) at a minimum order of fifteen (15) sets. Mail your order form with your check today to:

Roy G. Bowen  
140 Frontier Road  
Sharpsburg, GA 30277

Your POSTERS will be sent the most economical way to your nearest facility.

Be advised that TLP&SA will NOT charge a percentage of all the money your company will SAVE by preventing claims. Please do not wait. Order your POSTERS now!

On the following pages you will find a flyer and a complete order form for placing your order. All you need to do is print out the order form, complete and mail with your check as indicated above.

**Set A**

- Unloading and Loading Pallets.** This poster and guide teaches using the tips of the blades to prevent damage teasing pallets).
- The Forklift on the Dock.** Demonstrates how to avoid damage claims when using the forklift on the dock.
- Rules for Double Stacking.** This poster and guide shows the cautions that must be taken when double stacking any freight.
- Handling and Loading Boxes.** This very important lesson concerning the strengths and weaknesses of corrugated
- Stacking and Loading Bags.** Shows the proper way to interlock bags on a pallet and how to protect bags when loading them.
- Improper Packaging.** Both City Drivers and Dock Workers are taught how to identify and react to improper packaging.
- The Super 6 of Counting.** Here we address the importance of counting and 6 methods to insure a good count.
- Loading Drums.** This poster speaks to how to handle drums and the use of dunnage to protect them.
- Beware the Tail.** Here we address the fact that 90% of all damages are in the final 10% of the trailer and how to avoid these.
- Create a Level Loading Base.** The methods of creating and utilizing a level base to stabilize the freight being stacked are taught.
- Delivering a Damage.** How to handle a situation where only the container is damaged. Also, the rules for taking a damage notation.
- Year-To-Date Claims Cost.** Used to meet, discuss, and display the claims cost situation. Cost, Goals and lost revenue are shown.

**Set B**

- Freight Theft.** Employees are reminded that freight theft is a federal crime and not tolerated. Training for management, also included.
- Furniture.** Shows when we can and cannot use the forklift. Also, how furniture is packaged and must be handled.
- Tall or Top Heavy.** Talks about tying, blocking, and bracing tall or top heavy freight. Also, the use of dunnage.
- Gaylords.** Instruction as to the handling, loading and stacking gaylords. The limitations and failures of gaylords are discussed.
- Sweep the Trailer.** Directives on the subject. "A trailer isn't empty until swept." Names the benefits and costs involved.
- Pallet Decks.** Requirements for claim free use are covered here. Also, How not to use a pallet deck.
- Pipe and Steel.** Different approved methods of using the forklift when handling pipe or steel; as well as loading requirements.
- Bill of Lading.** Talks about it being a binding contract signed by our drivers and the pitfalls of signing for something not received.
- Stay Focused.** This poster uses an eye test chart to demonstrate that labels are hard to read and we must remain focused on our work.
- An American Tradition.** A patriotic statement that quality work has always been a tradition in America, and must continue.
- Get Reel!** Teaches the handling, loading, chocking, and bracing of reels of cable. How to and how not to do it.
- We Pay for Our Errors.** This is a check showing the terminal's claims cost for the year and a pledge for the following year.

**Set C**

- What Can We Do?** A play off the Presidents words "Do Your Work". A discussion of what each can do for country and company.
- Poor Work.** Shows poor workmanship turning "cash to trash and robs jobs". How we can improve the results of our work.
- Start at the Beginning and End with Style.** Speaks to the importance of starting and finishing a trailer properly.
- Prohibited.** Items that we may not be able to transport. What drivers should do when offered certain items.
- Get Ready, Set, Go.** Preparing for your work. Getting the right tools and equipment and how to use them.
- Refused.** What to do, information to gain and how to react to a shipment being refused at the time of delivery.
- Young Ben Franklin Speaks on Claim Prevention.** Sayings from Poor Richard's Almanac as they pertain to claims prevention.
- A Good Count Really Counts.** Teaches how to count and the outcome when we fail to do so.
- But, the Packing List Says -** How to handle a situation when the packing list, freight bill or freight labels do not agree.
- Keep it Clean.** Promotes good housekeeping and speaks of the reason it is important.
- No One is Above the Law.** Santa has Elf arrested for theft of a small toy. No theft is small enough to avoid prosecution.
- A Christmas Carol.** Why on-time, claim free delivery is important to the world, the nation, our company, and our jobs.

Ordering a Custom Poster: Subject: \_\_\_\_\_ Title: \_\_\_\_\_

Items to cover: \_\_\_\_\_

Points to make: \_\_\_\_\_

Proposed Artwork: \_\_\_\_\_ email: for set-up costs: [TLPSAposters@yahoo.com](mailto:TLPSAposters@yahoo.com)

**ORDER FORM**

Complete sets of A, B and/or C = Circle the Sets desired [A] [B] [C] X No. of each set \_\_\_\_\_ X \$39.50 = \$ \_\_\_\_\_

There is a minimum order of 15 for each of the 3 sets available here. (15 of each poster if ordering 1 set, 30 if ordering 2, & 45 if ordering all 3)

Order by picking specific posters from each set above. Just check the ones you need on the above listing.

Number of individual posters ordered \_\_\_\_\_ X the number of each needed \_\_\_\_\_ X \$4.00 = \$ \_\_\_\_\_

There is a minimum order of 15 for any single poster.

Please make check payable to: Roy G. Bowen, 140 Frontier Rd. Sharpsburg GA 30277

ENCLOSED = \$ \_\_\_\_\_

**Terms and Conditions**

We understand that each of the posters listed here have copyright restrictions and cannot be reproduced for any purpose. Further, that they are designed for the exclusive use by the customers of Transportation Loss Prevention and Security Association. The meeting guides may be reproduced for the use by the purchasing company only. We will allow four weeks for shipping. Payment is enclosed for this order. Shipping is on a Dead Head basis from your Atlanta GA location or freight collect if you have no Atlanta GA location.

Signature \_\_\_\_\_ Position \_\_\_\_\_ Company \_\_\_\_\_

Ship to: \_\_\_\_\_ Address: \_\_\_\_\_ City/ST/Zip \_\_\_\_\_ via \_\_\_\_\_

If shipping UPS, Airborne, etc., please give credit account number for collect shipping. # \_\_\_\_\_



## **YOUR TRANSPORTATION LOSS PREVENTION & SECURITY ASSOCIATION IS OFFERING A NEW POSTER TRAINING PROGRAM.**

The [TLP&SA](#), in conjunction with its agent, Roy Bowen is offering a new program that provides posters and meeting guides on real life claim problems and their solution. A meeting guide (text) comes with each poster type. The guide is to assist your supervisors or managers in holding a two to four minute meeting with all employees, concerning the subject covered.

Roy has more than 40 successful years experience in developing and implementing training aids, procedures, and methods for motor carriers. The TLP&SA also has input to the material used. As you will see on the order form provided, the subjects covered are those that are the root causes of most loss and damage. Many of these address security and theft problems.

**Your order will not only help support our association, but as well will lower your losses and improve service to your customers.**

To order, please follow the instructions on the order form provided, and forward your order and payment to:

**Roy G. Bowen**  
**140 Frontier Rd.**  
**Sharpsburg GA 30277**

**PLEASE USE AND MAIL THE ORDER FORM PROVIDED HERE WHEN ORDERING.**  
**PAYMENT MUST ACCOMPANY EACH ORDER.**

For more information -email: [TLPSAposters@yahoo.com](mailto:TLPSAposters@yahoo.com) telephone: 770-463-9304  
 We would prefer that any questions concerning this program be emailed to the address shown above. Be sure and include your company name, address and telephone number.

*The Transportation Loss Prevention and Security Association appreciate your support.*

## TRANSPORT LAW REVIEW

**Course of Dealing...Shipper's Responsibility to Know the Rules...Purchase of Cargo Insurance as Evidence of Shipper's Knowledge of Limitation of Liability...Continued Denials of Carmack Preemption in Federal Court. These are the issues making news in the law.**

### COURSE OF DEALING

State courts and courts unaccustomed to transportation issues appear to be seizing on concepts with which they are familiar. One of these concepts is "course of dealing". A course of dealing is a "sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." UCC 1-205. Many times the concept of course of dealing is linked with a "sophisticated" business person.

Several federal and state trial courts have rejected lack of knowledge defenses where there has been a documented course of dealing between sophisticated business people. **Schweitzer v. Landstar Ranger**, 144 F. Supp. 2D 199, (W.D.N.Y. 2000) (limitation of liability in tariff upheld despite shipper's claim it lacked actual knowledge); **Federal Ins. Co. v. Air Express Int'l Corp.**, 1994 WL 176967, (S.D.N.Y. May 10, 1994) (limitation of liability upheld based on a regular and repetitive business dealings despite claim of lack of notice or agreement.

TIP: This concept can be a double-edged sword if inadvertently several transactions have not followed your rules and tariffs. Be careful before you set your company up for a course of dealing argument in reverse. This is something that can be provided for in your tariff.

### SHIPPER'S RESPONSIBILITY TO KNOW THE RULES

An excellent opinion was rendered at

the end of the summer in the year 2001 in the case of **EFS National Bank v. Averitt Express, Inc.**, 164 F. Supp. 2d 994 (W.D.TN. 2001) the court held that legislative history of the revised Carmack Amendment reveals that the intent of Congress in amending the statutes was to return to the pre-TIRRA situation where shipper's were responsible for determining the conditions imposed on the transportation of a shipment. Accordingly, the court upheld the limitation of liability.

In an excellent opinion, the court goes through the current applicable section of the Carmack Amendment, section 14706 (c) (1) (B) wherein the motor carrier must provide its tariff "on the request of the shipper". The court finds that the new Carmack Amendment allows carriers to limit their liability in the same way as the pre-1996 version. The court holds that the legislative history of the revised Carmack Amendment reveals that the intent of Congress was to impose certain responsibilities on the shipper to determine the carriers rules and regulations. To the joy of our friends at Roadway the **Averitt** court indicates that the **Toledo Ticket case**, 133 Fed. 3d 439 (6<sup>th</sup> Cir.1998) and the **Trepel case** 194 Fed. 3d 708 (6 circuit 1999) do not pertain to the law as it exists today. Moreover, the court dissects the classic "Four Pronged Test" previously applied in limitation of liability cases and states that those factors may no longer be completely relevant and the bill of lading is a sufficient written agreement by both parties allowing the carrier to limit its liability to the terms stated in its tariff.

### PURCHASE OF CARGO INSURANCE AS EVIDENCE OF SHIPPER'S KNOWLEDGE OF LIMITATION OF LIABILITY

In an interesting case decided in the United States District Court for the Southern District of New York the court dealt with both the concept of course of dealing as well as the shipper's purchase of cargo insurance. In **Ingram Micro, Inc. v. Airoute Cargo Express, Inc.**, 154 F. Supp. 2d 834 (S.D.N.Y. 2001) the court ruled that Carmack did not apply because the shipment originated in Canada, and that the Warsaw Convention did not apply because the shipment was by truck, not air. The court decided that since the contract originated in California, federal common law should apply to "a shipment from an adjacent foreign country to the U.S. by ground." Nevertheless, the court used Carmack analysis and upheld the carriers limitation of liability. Initially, observing that the parties had been using the same agreement with a limitation of liability for a substantial period of time, the court went onto observe that the shippers purchase of **separate cargo insurance** demonstrated that the shipper was on notice and understood the limitation of liability. The court noted that under federal common law, the function served by notice of limited liability is accomplished if the shipper in fact purchases separate insurance, whether or not such notice is actually given. The court went on to say "as recently explained by the Ninth Circuit, why would [the shipper] increase its costs by insuring the same cargo twice?" **Travelers Indem. Co. v. The Vessel Sam Houston**, 26 Fed. 3d 895, 900 (9<sup>th</sup> Cir. 1998).

## **DENIAL OF CARMACK PREEMPTION**

It appears that there is a growing "conspiracy" among Federal District Court Judges to find some way to remand Carmack cases that have been removed to the Federal Court. Those courts that seek to remand Carmack cases rely on the fact that the party invoking the Court's jurisdiction bears the burden of establishing that such jurisdiction exists and that the District Court is required to resolve all doubts about federal jurisdiction in favor of remand.

Courts that support remand also invoke the "well-pleaded complaint rule" wherein the plaintiff usually pleads only state law claims. In a recent unpublished decision there was a twist of which we should all be aware. The case of **Kellwood Company v. Overnite Transportation Company** was removed to the United States District Court Eastern District of Missouri. The Federal District Court Judge found that the goods in question were being held in a warehouse subject to an on-hand notice. The goods were then sold pursuant to the bill of lading when no disposition was received from the shipper. The shipper took the position that the Carmack part of the shipment was over and that the carrier was merely a state law warehouseman when the goods were improperly sold.

The carrier took the position that everything that was done with the goods was pursuant to the interstate bill of lading and its terms and conditions requiring sale if no disposition were received. The court remanded the matter holding that the loss of goods did not occur during warehousing as a "terminal service incident to an interstate shipment" as provided under the federal regulations. Rather the court held that

these goods were warehoused not in transit or as a terminal service in place of destination, but in a distant location for retrieval by the shipper subject expressly only to warehouseman liability. Thus the court found that the Carmack Amendment did not apply.

Nevertheless, in a carrier "reversal of fortune" case, a matter was remanded to State Court and the State Court held that the Carmack Amendment preempted the contract action. In the case of **Circle Redmont, Inc. v. Mercer Transportation Company, Inc.**, 2001 WL 1142172 (Fla. App. 5 Dist.), the shipper brought a breach of contract and conversion action against the common carrier seeking damages for failure to collect cash on delivery (COD) charged on the manufacturer's behalf. The carrier sought removal to Federal Court, and the shipper filed a Motion for Remand. The District Court granted the remand motion.

On remand, the State Court in **Circle Redmont** following a bench trial entered judgment for the common carrier. The shipper appealed and the District Court of Appeal in Florida State Court held that the breach of contract action was preempted by the Carmack Amendment and the shipper was not entitled to amend its complaint to add the Carmack Amendment claim.

In other words, the State Court found that Carmack applied and then disallowed any amendments by the plaintiff seeking to argue Carmack since the plaintiff had always taken the position throughout the trial that Carmack did not apply.

The moral of this story is one can never tell which judge is actually

going to understand the law! In **Circle Redmont**, we had offered \$60,000.00 to settle but the shipper demanded \$65,000.00 and eventually received nothing.