IN TRANSIT

Transportation Loss Prevention & Security Association

Autumn 2004

INSIDE

Transportation Loss Prevention & Security Association

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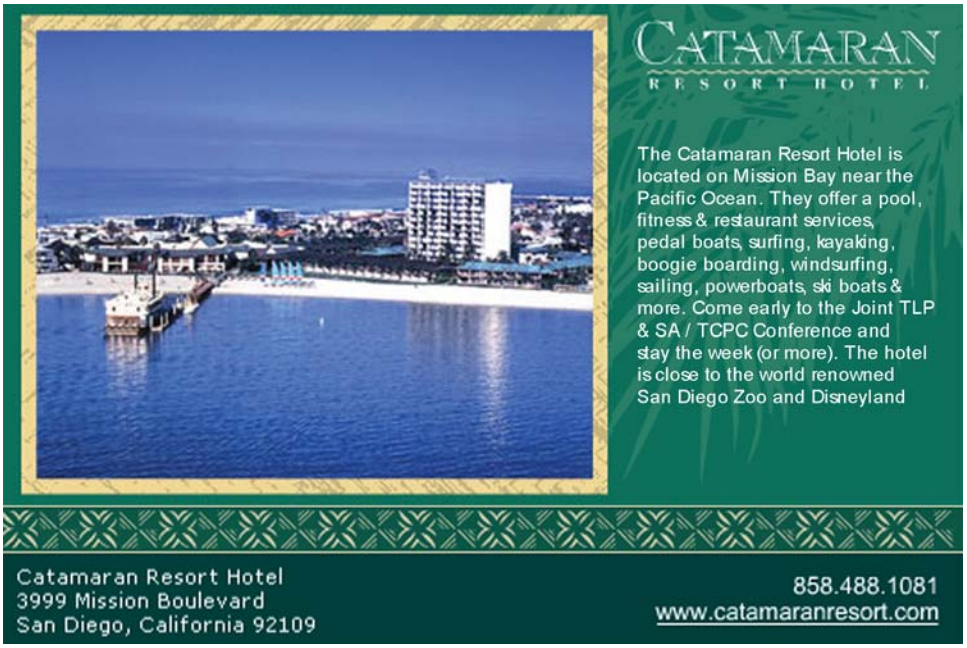

Mark your calendar now! March 20-23, 2005

Transportation Loss Prevention and Security Association

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COURTS CAN BE CRUEL

By *William D. Bierman, Esq.* - Nowell Amoroso Klein Bierman, P.A. (Executive Director of the TLP & SA)

HOURS OF SERVICE DOWN FOR THE COUNT

I have lost cases in my day. I have even lost cases I thought I should have won. We all know you can never accurately predict what a court will do. But the FMCSA (Federal Motor Carrier Safety Administration) experienced a devastating loss in court recently, as devastating a loss as the United States Olympic Basketball "Dream Team" experienced at the hands of little Puerto Rico! The FMCSA's vaunted and long prepared for Hours of Service Rules went down for the count at the hands of United States Court of Appeals for the District of Columbia on July 16, 2004. A day that will live in judicial infamy at the FMCSA. [Reported to our membership by ALERT July 19, 2004]. The Agency is still reeling from the blow and has not as yet been able to respond.

FMCSA DID NOT ADDRESS DRIVER'S HEALTH

Like any sports upset, it was a little thing that did in the FMCSA. The Administration simply failed to comply with the congressional mandate that it address drivers health. In all fairness to the attorneys involved, this issue was raised as an aside by the Petitioners, "Public Citizen", a public interest group, and the issue covered less than two pages of their brief. Nevertheless, in the eyes of the Court, this issue was enough to vacate the entire rulemaking and to send the issue back to the FMCSA for action in accordance with the opinion.

EFFECT OF COURT DECISION

What does the Court's action mean for the industry? Well, first it should be noted that courts are not always aware of the consequences of their actions vis-a-vis an entire industry. In this case most carriers have spent substantial time and money getting ready to comply with the Agency that regulates their operations. Since May 2000, the date of the proposed rulemaking, countless seminars and in-house training sessions have been held in an effort to bring carriers and their drivers up to speed on the new regulations. Preparation of proper log books had to be revisited and brought into line with the new hours of service. Operations people had to be retrained. Customers had to be educated on the ramifications of the new rules and waiting times had to be addressed. Actually, from all accounts, the industry as a whole did a great job and undertook to perform according to the new rules in an admirable manner.

So what happens now? Unless the FMCSA takes some further action, to appeal or ask for a rehearing, the new rules will stay in effect until September 6, 2004 when the prior regulation would go back into force. Chaos may be a bit of hyperbole, confusion may be a better word, but certainly the industry will take a substantial hit both practically and financially. To drop the new rules, go back to the old rules and await possible new-new rules is more than the industry should have to bear.

COURT ALTERNATIVES

What could the court have done? Considering the fact that the new rules have been in effect for a little less than a year, the court could have ordered a study of the impact of the new rules after the first year to determine their effect on the driver's health. This proposed study together with additional studies the FMCSA may have left out of its presentation or which may be available in the literature, could supply the needed information that the court found lacking without disrupting the whole industry and without risking a severe drop in compliance. After all, the court did not conclude that the new hours of service rules adversely affected the driver's health, it merely found that the new hours of service rules did not properly address the issue of the driver's health.

MINIMIZE ADVERSE EFFECTS

Unfortunately we all have to live with the court's opinion at the present time, but hopefully the FMCSA will take appropriate actions to minimize the adverse effect on the industry while accommodating the court's objections to its rules even if it means going directly to Congress to enact a law governing the hours of service which would obviate the court opinion until or unless the act were challenged. This is clearly one problem the industry did not create and the industry should not have to suffer for it.

FOOTNOTE: The FMCSA has asked the Circuit Court of Appeals to leave the current hours-of-service rules in effect until the agency can correct the court's concerns regarding the regulations, Annette M. Sandberg, administrator of the FMCSA, said in a release Monday, August 30. While it is awaiting a ruling on that request, the agency is already moving to correct the court's concerns.

PARTNERSHIP AGAINST TERRORISM?

By *Erik Hoffer,* President CGM Security Solutions (tamperguru@comcast.net)

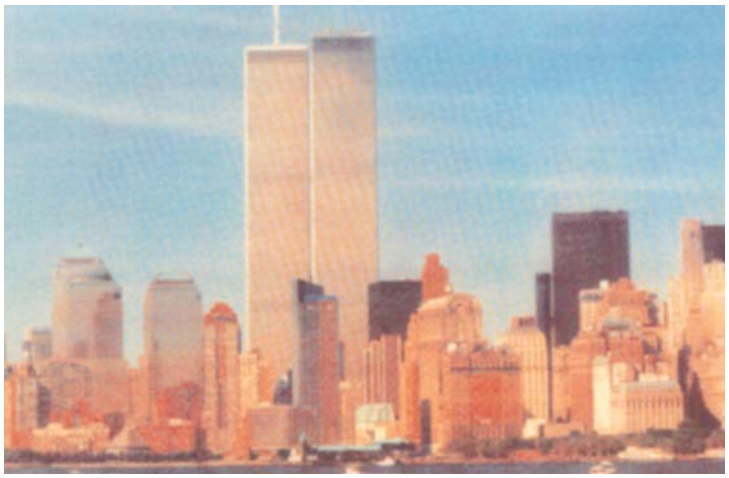
C-TPAT (Customs - Trade Partnership Against Terrorism)

CARGO SECURITY - A TRUE BUSINESS REALITY!

There is a new paradigm in dealing with cargo security issues. Cargo security, the stepchild of corporate loss, has somehow now moved closer to the board room where it has become a true business reality. Since the nexus from theft losses to the erosion of profits from economic terrorism is more easily understood by everyone, there is now a more acute need to explore remedy.

The Government has asked that shippers take a more active role in assuring the safety of our ports and borders. They certainly cannot do it alone. In order to accomplish that task with some semblance of order, security and consistency, a document has been adopted that requires both awareness and participation by shippers as the carrot (for the fast transition of cargo through the ports) and the possibility of slower and more encumbered cargo transfer, as the stick. This document is commonly known at C-TPAT.

C-TPAT is a voluntary participatory program that asks industry to assume an active role in protecting our borders and ports by acting in good faith to insure the secure packing and sealing of cargo destined for the US by land or sea. For many years BASC, the Business Anti Smuggling Coalition, has had a similar mission, with interdiction and confiscation as the stick and really no viable carrot for those shippers who comply. Protecting their unaccompanied assets through intermodal transit both secures their goods from theft but moreover has served to secure it from the introduction of contraband in the form of illegal drugs.



U.S.A. NEEDS US HOW DO WE COMPLY?

No one denies the value of such programs and no one better understands the benefits of the rapid and fluid movement of cargo than importers and carriers. The issue is not understanding the benefits of the program rather the issue is compliance with a truly nebulous set of standards. The author has met and worked with literally hundreds of clients moving both highly valuable and highly vulnerable cargo into the United States. All of these shippers, carriers and importers seem to say the same thing. Their question is simply, "what do you want me to do to be compliant" and "what benefit will I get for doing it"? "Give me instructions and I will comply, but without direction I am at a loss to know what technique will eventually be compliant". "Without such a plan, why should I create a security system or use a product, protocol or technology that may be outdated with the stroke of a pen?"

Those in Government drafting much of this C-TPAT document and surrounding legislation fail to understand the actual physical threat to the cargo containers themselves. That is, how they are surreptitiously penetrated, what needs to be done to identify anomalies through current inspection methods and how we can institute an affordable deployable mechanism to audit all inbound cargo? They do understand the fact that there is a great deal of vulnerability to our ports and borders from threats based on unaccompanied cargo but their frustration, in their defense, is that they have no power to encumber private industry to do anything specific

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about it. Without a specific plan of action, industry is mired in the gray area of wanting to comply but not being able to act. This entire system breaks down for that specific reason. We have given those in Government exactly half of what they need to get the job finished. What they need is the power to mandate a first position solution now before we have a problem.

Without a decisive basic plan to reduce the threat, nothing will ever happen and we will continue on, years after 9/11, without a true specific security mandate… that is the bureaucratic way isn't it?. If we understand that every program of this nature has to have a starting point (which can be modified based on threats and current events), we would be able to stop wasting time and initiate a suitable program now to address the current situation.

IS IT SEALED? - HOW WELL IS IT SEALED?

Many in Government are fixated on the 'specifications' for seals through ISO (International Organization for Standardization) standards, while failing to understand the misplaced application of seals in determining their utility in the field. The strongest bolt can be circumvented, the approved cables can be easily penetrated and in many cases doors can be removed if the perpetrator is clever enough. Many even think a bolt seal is actually a security product for a trailer or a container! A considerable amount of time and a tremendous amount of money has been spent on the development of electronic seals. Both platforms are quite ridiculous for many reasons and they do not serve to enhance the protection of our borders nor provide shippers true security to cargo issues. Electronic seals in fact, have proven time and again to be inadequate while the development of critical ISO specifications for bolt seals is almost comical. Both electronic seals and bolt seals can be circumvented in under 15 seconds surreptitiously by even a novice thief or terrorist, so why the inference on their utility? This is a fact known to Customs and surely by this time also known to DHS (Department of Homeland Security). DHS is planning on taking an active roll in evaluating this issue but that cannot come fast enough for me.

WE NEED TO ACT NOW - BEFORE AN EVENT!

The time for industry to act is now. If we wait, we risk losses far greater than the physical assets which we need to protect. The demise of a brand is as simple as an explosion in a container of their goods. We are also one blast away from a complete breakdown in the world supply chain, which will follow seconds after the blast and begin at the port of importation of that container.

Industry, not government alone, must take the basic structure of the C-TPAT initiative and develop their own sealing standards of care, for cargo. These countermeasures must be implemented immediately to insure the integrity of the container doors and thereby the security of our borders and ports. Only through sealing the keeper bars can a container be secured. This can be done now with commercial cable or bar type seals. Government must embrace these known technologies and condone and reward their use by C-TPAT compliant companies. They should provide expedited passage to those companies and carriers using them and deny the same status to those still in the dark ages of sealing. In that way the positive initiatives taken by those wishing to comply with their C-TPAT contract can in fact do so!

The need to act is now - before an event!

TRANSPORTATION CASE SUMMARIES

(AUGUST 2004)

by *Wesley S. Chused* - Looney Grossman, LLP

1. Atlantic Mutual Insurance Company. v. Yasutomi Warehousing and Distribution, Inc., 2004 U.S. Dist. LEXIS 13235 (C.D. Cal. 2004). **(Released rate limitation upheld)** This decision nicely demonstrates the legal and common sense basis for upholding a liability limitation in a bill of lading where the shipper neglected to declare a value. In Atlantic Mutual, a container of freight belonging to the plaintiff's insured was stolen while in the custody of the defendant, who asserted that its liability was limited to $50 per shipment, as provided on the bill of lading, because no value had been declared by the shipper. The claim involved a shipment of five containers consigned to the plaintiff's insured. The defendant delivered four of the five containers, but the fifth could not be delivered until 5:00 p.m. on Friday, April 6, 2001, so the defendant was instructed to hold the fifth container until the following Monday. The container was stolen over the weekend and the defendant could not find the bill of lading for that shipment, but did have them for the other four. The court noted that failure to issue a bill of lading did not affect the liability of the carrier and that the Carmack Amendment applies to the inland leg of an overseas shipment regardless of whether the shipment is conducted under a single, through bill of lading or under separate bills of lading. Based on those facts, together with the parties' course of dealing which showed that the shipper had never declared a value on any of the approximately 101 containers previously handled by the defendant, the court ruled that the plaintiff could not claim that its insured was without notice of the terms and conditions of the bill of lading. The defendant's maximum liability was $50. An interesting issue that never arose in the decision is whether the defendant had made timely tender of delivery on the preceding Friday. If it had, and the reason for the non-delivery was due to the consignee's refusal to accept the delivery, an argument could be made that the consignee's failure to accept delivery on Friday converted the carrier's liability status from that of a carrier to that of a warehouseman, which would necessitate proof of the carrier's negligence.

2. Oregon Metallurgical Corporation v. Burlington Northern & Santa Fe Railway Co., 2004 U.S. App. LEXIS 10331 (9th Cir. 2004). **(Special damages permitted).** In this case, decided on May 25, 2004, the court ruled that a shipper could recover special damages for "loss productivity" as a result of the defendant railroad's unreasonably late delivery of a shipment of chemicals the plaintiff needed to manufacture titanium sponge. Although the district court had granted summary judgment in favor of the railroad because the plaintiff shipper had not suffered any actual damages in that it sold the titanium sponge that it manufactured to a sister corporation at cost, the Circuit Court reversed and ruled that the plaintiff had demonstrated that it had been damaged by the loss of its ability to produce as much titanium sponge as it desired due to the late shipments of the raw material. The court ruled that this was sufficient evidence of damage to withstand summary judgment and that the measure of this damage is a question of fact to be resolved at trial.

3. Emerson Electric Supply Co. v. Estes Express Lines, 2004 U.S. Dist. LEXIS 12965 (W.D. Penn. 2004). **(Released rates; origin condition)** This case involved interesting cross-motions for summary judgment by shipper and carrier. The plaintiff sought to recover $158,360 for damage to a shipment of electronic equipment transported by the defendant motor carrier from Houston, Texas to Sharon, Pennsylvania. The defendant sought to limit its liability to 10 cents per pound based on its tariff limitation. Alternatively, the plaintiff argued that the defendant's "extraordinary value" tariff item should apply, which would increase the defendant's liability limit to $7.90 per pound. When the defendant picked up the shipment, its driver applied a pro-sticker, stating that the terms of the defendant's rules

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tariff would apply. The tariff rule provided that "uncrated new equipment and machinery. . . will only be accepted for transportation when the shipper releases the value of the property to a value not exceeding ten cents per pound. . . ." The defendant motor carrier also demonstrated that the shipment was not mishandled during transportation. No notation of damage was made on the delivery receipt, and the plaintiff claimed that the damage was not noticed until after the truck left the plaintiff's facility. The court denied the plaintiff's motion for summary judgment, ruling that it had not provided evidence that the shipment was in good condition at the time it was delivered to the defendant. The court then analyzed the carrier's liability under the Carmack Amendment and the standards that must be met in order to uphold a released rate limitation. The court seemed to be stuck on the notion that carriers must offer a full value rate option to the shipper. The court noted that although there was a declared value box on the bill of lading, prepared by the shipper who was sophisticated and experienced in shipping its products, it nonetheless found that even if the declared value box had been filled in, there would not have been greater "coverage" available and the plaintiff, therefore, was not provided with an opportunity to choose between two or more rates. Based upon that finding, the defendant's motion for summary judgment was also denied.

4. Jones Motor Co. v. Anderson, 2004 Ga. App. LEXIS 949 (2004). (***Carrier "subrogates" against vandals who damaged freight)*** In this unusual case, the Court of Appeals of Georgia upheld the right of a plaintiff motor carrier to maintain a subrogation action against the defendants who had vandalized certain freight while being transported by the plaintiff. The plaintiff paid its shipper/customer for the damage and then sought to recover those damages from the defendant vandals. The lower court had dismissed the claims against the defendants on the basis that there had been no formal assignment of the shipper's claim to the motor carrier, but the Court of Appeals reversed, ruling that a formal assignment was not necessary for the motor carrier to maintain an equitable or legal right of subrogation.

5. S&H Hardware & Supply Co. v. Yellow Transportation, Inc., 2004 U.S. Dist. LEXIS 13158 (E. D. Penn. 2004). **(Nine-month claim filing rule)**. One of the plaintiff's employees was involved in a scam to intercept shipments consigned to the plaintiff and transported by the defendant motor carrier. The employee would call the defendant's driver to divert the shipment to a location where the employee met the truck, took delivery of the goods and paid the freight bill (and tipped the driver). After the plaintiff received an invoice from its vendor for over $1.6 million due on outstanding invoices, the scam was discovered. The plaintiff never filed a formal written claim with the carrier and the carrier's bill of lading contained the standard nine-month claim filing limitation. The plaintiff attempted to avoid the application of the nine-month claim-filing rule by relying on the so-called "estoppel" exception, arguing that the carrier should have inferred from its own involvement in the investigation that the shipper had a claim for the misdeliveries. However, the court ruled that a carrier's actual knowledge of a potential claim does not relieve the claimant from its obligation to file a written claim, nor did the plaintiff, at any time during its investigation of the diverted shipments, advise the carrier that it was making a claim or intended to file one. Noting that there was no evidence that the carrier had misled the plaintiff into believing that it need not file a claim, the court granted a summary judgment for the defendant motor carrier. [The court also observed that the plaintiff did not suffer any monetary loss as a result of the diverted shipments because it admitted that it had not paid for the shipments it did not receive. Therefore, it could not make out a cause of action in any event].

6. Alpina Insurance Company, Ltd. v. Transamerican Trucking Service, Inc., 2004 U.S. Dist. LEXIS 14264 (S.D.N.Y. 2004). **(COGSA suit-filing limitations)**. A shipment of equipment imported from Germany was damaged while being transported by truck from New Jersey to Nebraska. The defendant motor carrier filed a motion to dismiss on the ground that suit was barred by the nine-month statute of limitations for bringing suit under the COGSA bill of lading, which also contained a "U.S. Clause" and a "Himalaya Clause." Collectively, those provisions required the shipper to bring suit within nine

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months after delivery of the shipment for any loss or damage in transit, that the carrier's liability was limited to $500 per carton in the absence of a declared valuation, and that the COGSA bill of lading applied to inland carriers after transport by sea. In addition to the nine-month suit filing provision in the bill of lading, COGSA provides a one-year statute of limitations for bringing suit. The court concluded that the defendants were entitled to the benefit of the defenses permitted under COGSA, that the motor carrier qualified as a participating inland carrier and that it could assert legitimate defenses under the ocean bill of lading. The court also rejected the plaintiff's argument that it should instead apply the limitations of the Carmack Amendment instead of COGSA. The court observed that while the Carmack Amendment generally applies to the domestic leg of an international journey if the domestic leg is covered by a separate bill of lading, it is inapplicable where the bill of lading governing the shipment is a through bill of lading. Since it was undisputed that the bill of lading was a through bill of lading, for all transportation from Germany to Nebraska, the Carmack Amendment was ruled inapplicable and COGSA's limitations applied. Since suit was filed more than a year after the delivery, the court ordered the case dismissed.

Transportation Abbreviations

AAR	Association of American Railroads
ATA	American Trucking Associations
ATA	Air Transport Association
ATLLP	Association for Transportation Law, Logistics and Policy
ATRI	American Transportation Research Institute
B/L(s)	Bill(s) of Lading
BMC-32	Bankrupt Motor Carriers Endorsement
BNF	Bill - No freight
BTS	Bureau of Transportation Statistics
CBP	U.S. Customs and Border Protection
CCPAC	Certified Claims Professional Accreditation Council
CDL	Commercial Drivers License
CFC	Conference of Freight Counsel
CFR	Code of Federal Regulations
C/L	Carload
CLM	Council of Logistics Management
CMI-S	Consequence Management Interoperability Management
COGSA	Carriage of Goods by Sea Act - 1936
CSI	Crime Scene Investigation
C-TPAT	Customs - Trade Partnership Against Terrorism
DHS	Department of Homeland Security
DOC	Department of Commerce
DOT	Department of Transportation
D/R	Delivery Receipt (P.O.D.)
EPA	Environmental Protection Agency
F/A	Free Astray (shipment without charge)
FAA	Federal Aviation Administration Authorization Act of 1994
FAK	Freight - All Kinds
FBI	Federal Bureau of Investigation
FDA	Food & Drug Administration
FHWA	Federal Highway Administration
FIA	Federal Insurance Administration
FMC	Federal Maritime Commission
FMCSA	Federal Motor Carrier Safety Administration
FNB	Freight - No bill
F.O.B.	Free on Board
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
GATT	General Agreement on Tariffs & Trade
GIGO	Garbage In - Garbage Out
HM / HazMat	Hazardous Materials
HOS	Hours of Service
IATA	International Air Transport Association
ICCTA	Interstate Commerce Commission Termination Act of 1996
ISO	International Organization for Standardization
ISPS	International Ship & Port Facility Security Code
ISTEA	Intermodal Surface Transportation Efficiency Act - 1991
LCL	Less than carload
LTL	Less than truckload
MARAD	Maritime Administration
MCA	Motor Carrier Act of 1980
MTSA	Maritime Transportation Security Act
N/A	Not Applicable
NAFTA	North American Free Trade Agreement
NASSTRAC	National Small Shipment Traffic Conference
NATA	National Air Transportation Association
N.B.	Nota Benel (Note Well)
NCIC	National Crime Information Center
NCIT	National Center for Intermodal Transportation
NCSC	National Cargo Security Council
NHTSA	National Highway Traffic Safety Administration
NITL	National Industrial Transportation League
NMFC	National Motor Freight Classification
NMFTA	National Motor Freight Traffic Association
NOI(BN)	No other indication (by name)
NRA	Negotiated Rates Act of 1993
NSA	National Security Agency
NSC	National Security Council
NTSB	National Transportation Safety Board
OIG	Office of the Inspector General
O,S & D	Over, short & damage
OSHA	Occupational Safety & Health Administration
OTT	Office of Transportation Technologies
OWB	Overage without billing
P C Wt	Per hundred weight
P.O.D.	Proof of delivery (D/R)
PRO	PROgressive number (Freight bill)
RFID	Radio Frequency Identification
RSPA	Research and Special Programs Administration
RTS or RTV	Return to shipper (or) Return to vendor
RVNX	Release Value Not Exceeding $ per pound
SAFETEA	Safe, Accountable, Flexible and Efficient Equity Act - 2003
SCAC	Standard Carrier Alpha Codes
SIC	Standard Industrial Classifications
SKU	Stock keeping unit
STB	Surface Transportation Board
TAB	Transportation Arbitration Board
TASC	Transportation Administration Service Center
TCPC	Transportation Consumer Protection Council
TIA	Transport Intermediaries Association
TIDA	Trucking Industry Defense Association
TIRRA	Transportation Industry Regulatory Reform Act of 1994
T/L	Truckload
TLA	Transportation Lawyers Association
TLP & SA	Transportation Loss Prevention & Security Association
TSA	Transportation Security Administration
UCC	Uniform Commercial Code
U.S.C.	United States Code
ZIP	Zone Improvement Plan

ONE SIZE DOES NOT FIT ALL!

by *William D. Bierman, Esq.* - Nowell Amoroso Klein Bierman, P.A. (Executive Director of the TLP & SA)

In the June issue of our IN TRANSIT NEWSLETTER, we discussed contracts and the various issues which should be addressed to tailor a contract to a company's individual specifications. We even listed 41 relevant items that the contracting parties might want to consider in negotiating their agreement. The thrust of the Article was to warn against thinking that just because you have a contract it means that you are protected against all possible conflict.

ATA MODEL AGREEMENT

Many of you may have recently heard that ATA in conjunction with NITL have put together a Model Truckload Motor Carrier/Shipper Agreement. This undertaking started many year ago and has undergone a series of revisions. And, although I applaud the idea and the hard work that went into this Model Agreement, I am constrained to issue a loud cry of caution that ONE SIZE DOES NOT FIT ALL!

While the Model Agreement does come with a COMMENTARY offering a list of "service terms" that should be considered, both carriers and shipper should not be lulled into a false sense of security that this Model Agreement will protect their individual interests just because a trade group of carriers and a trade group of shippers have come to an understanding that the language in the Model Agreement will do no harm.

PROS AND CONS

What can the Model Agreement do? It can point to various areas that should be considered and negotiated. It can suggest certain language which may be used. It can act as a starting point for discussion.

What can the Model Agreement not do? It cannot provide the individual items necessary to make your contract work. It can not act as a substitute for factual negotiation. Only the specific carrier and shipper understand their commercial needs and requirements.

PROBLEMS

One of the problems with the Model Agreement is that it provides certain language which may be difficult to alter because it is already there. It is harder to negotiate terms when one side or the other takes the position that there should be no deviation from the Model Agreement language because it has already been agreed upon by carrier and shipper groups. Another problem is that the Model Agreement suggests by its very nature that all terms listed therein should be in every contract. In other words, the Model Agreement creates a mindset that will be very hard to change and may inhibit real negotiation.

The most significant problem with the Model Agreement is that it does not address the "waiver" issue provided for in 49 USC §14101. ICCTA provides that:

"If the shipper and carrier, in writing, expressly waive any and all rights and remedies under this part for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the waived rights and remedies and may not be subsequently challenged on the ground that it violates the waived rights and remedies. The parties may not waive the provisions governing registration, insurance, or safety fitness."

Parties should be cautioned that this provision presents potential legal problems as well as provides substantial rights. Courts have already questioned whether the exact language of the statute must be used to accomplish a valid waiver or whether the waiver can be implied by the use of different rules provided in the specific contract. Failure to address this issue alone can do substantial damage to your agreement or even allow a court to rewrite your agreement which may be contrary to the parties intent not to mention the costs and fees which may be necessitated to try and uphold your contract.

YOUR COMPANY'S SITUATION IS UNIQUE

I guess that what is troubling about the Model Agreement is that it is too easy. It may be seen as just the alter ego of the Bill of Lading, a document which itself provides all the necessary rules, regulations and agreements which protect both parties. The Model Agreement certainly is not. Each contract is almost like recreating the Bill of Lading together with a carriers tariff because your contract is essentially taking the place of the Bill of Lading together with the carriers tariff. This undertaking should not be done in haste or as they say "you will repent at leisure". Each important issue must be looked at and negotiated depending on the result that is anticipated. There is no Model Agreement for <u>your</u> situation. If a contract is important enough to negotiate, both sides should have proper legal advice throughout the procedure. After all, your contract is supposed to prevent future problems not be a breeding place for them.

Therefore, use any model agreement with extreme caution. While the clothes may look good in the showroom, it is no bargain if you can't button the jacket when you get it home. One size does not fit all!

The BMC-32 ENDORSEMENT: CAUSE and EFFECT

By *Lee Starling* - Carolina Casualty Insurance Company

TO INCREASE or NOT TO INCREASE - THAT IS THE QUESTION!

As most people in the transportation industry are aware, there has been recent movement to increase the amounts shippers and consignees can recover under the BMC-32 Endorsement. This endorsement provides indemnity to shippers and consignees when an exclusion in an underlying insurance policy allows an insurer to deny a loss incurred by its common carrier insured. The current maximum recovery allowed by law under the BMC-32 is $5,000 on any one loss and no more than $10,000 on a multiple stop load. If the BMC-32 is amended, as some intend, the limits would be increased anywhere from $25,000 to $50,000.

In my ten-year career in claims I have worked for a regional LTL carrier, truckload carrier and in the trucking insurance industry. Having the opportunity to stand on both sides of the fence so to speak, one thing remains consistent, all claims large and small, impact a company's operating ratio. This profit and loss ratio is the main reason for the vigorous pursuit of an increase in the limits of the BMC-32 Endorsement.

The majority of BMC-32 claims I have handled fall within the current $5,000 to $10,000 limits of the Endorsement, or, to the extent the limits are exceeded, are not exceeded in an amount as great as the proposed increased limits. The increase would serve to indemnify shippers and consignees in those infrequent instances, such as when a full truckload theft occurs. However, in pursuit of better protection against losses not covered by insurance companies, the proposed increase in the BMC-32 limits, if adopted, may change the landscape of the transportation industry.

WILL WE CONTINUE TO HAVE INSURANCE COVERAGE? - AT WHAT COST?

As Newton's Third Law of Motion states, "for every action, there is an equal and opposite reaction". Insurance companies underwrite "risk". Policies of insurance contain conditions and exclusions, which reduce exposure to loss and allow insurance companies to write coverage at an affordable price. If the BMC-32 increase comes to fruition the "risk" would be for all intent and purpose, "blanket" coverage for Motor Carriage. All perils coverage would force insurers to elevate premiums to offset the risk. Insurance premiums would escalate to such an extent that cargo insurance would be unaffordable for most small to mid-size carriers. It is even foreseeable that some insurance companies would cease writing cargo.

WHO WILL SURVIVE?

Many brokers depend on smaller transportation companies to haul its client's merchandise. If the majority of small trucking businesses become extinct due to astronomical insurance rates, larger carriers will benefit and flourish. Can the smaller brokers sustain a profit in that type of transportation environment?

If the BMC-32 limits soar to $25,000 - $50,000, it is not a question of if insurance rates will increase, but simply what impact the rates will have on the transportation industry as a whole. In the "cause" to protect the interests of the shipper and consignee, have those who support and seek the increase stopped to consider the "effect" of such change?

Membership Additions

The TLP & SA wishes to welcome new members:

Michael J. Codianni - New Century Transportation - Westampton, NJ
Edgar Mc Queen - Southeastern Freight Lines - Columbia, SC

Welcome back:
John A. Anderson - Anderson & Yamada, P.C. Portland, Or.

Bill Bierman and Ed Loughman in the TLP&SA Office
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CGM Security Solutions specializes in safety and security products that protect a company's valuable and sensitive assets while they are within the supply chain or while they remain unattended. Our core products are tamper-indicative labels and tapes that are placed over enclosures and offer a quick and highly effective means of visual inspection to determine the integrity of the package, container or material.

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