IN TRANSIT

February 2003

INSIDE

Transportation Loss Prevention and Security Association

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YELLOW FREIGHT PRESIDENT & FEDERAL DIRECTOR OF CARGO SECURITY TO APPEAR AT TLP&SA ANNUAL CONFERENCE

THE TRANSPORTATION LOSS PREVENTION & SECURITY ASSOCIATION CONFERENCE WILL TAKE PLACE AT

THE NUGGET RESORT HOTEL IN RENO, NEVADA

a joint conference with the

TRANSPORTATION CONSUMER PROTECTION COUNCIL, INC.

APRIL 6 - APRIL 9, 2003

JAMES WELCH, President of Yellow Transportation and GEORGE RODRIGUEZ, Director of Cargo Security at the Federal Transportation Security Administration, will be the featured speakers at this year's joint Conference with the Transportation Consumer Protection Council, Inc.

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CALL FOR EXHIBITORS

If you wish to exhibit at the TLP&SA Conference or know of a company that wishes to exhibit, please contact Ed Loughman at Headquarters (eloughman@nakblaw.com or 201-343-1652). Prime exhibit space is going fast and this conference promises to the be best place to go this year for cargo and security issues.

YOUR CUSTOMERS WILL BE THERE - SO SHOULD YOU!

A VIEW FROM THE EXECUTIVE DIRECTOR...

LUNCH WITH A HERO

He was about ready to retire. He was a large man with a round, experienced face and a natural smile. He told stories of when a truck driver was thought of as one of the " Knights of the Road," when a stranded motorist would think he or she had won the lottery if a truck driver passed by because that truck driver would always stop to help. As Ron Lantz sat uncomfortably among men with suits and women in office attire at the New Jersey Motor Truck Association Conference, held at the East Brunswick Hilton on November 7, 2002, he certainly looked to be a most unlikely hero. But hero he certainly was, since he was the one who spotted a car at a Maryland rest stop on October 23 that matched the police description of the alleged snipers' vehicle. Ron then alerted authorities and used his truck to block the suspects' escape.

Ron told me candidly over lunch, before receiving an award, that waiting for the authorities was the longest fifteen minutes of his life! I asked him if he ever thought of just driving away to safety and he said "No. I had a job to do and I just did it. It was what any other American would have done." There, in a nutshell, was the character of Ron Lantz. Surrounded by several executives of his company, Bass Transportation, located in Flemington, New Jersey, Ron represented many of his generation who simply saw their duty and did it without boast or brag.

As Ron stood to receive his accolades, he was both humbled and embarrassed by all the attention. Slowly, as all the dignitaries heaped praises upon him and the NJMTA gave him a check to help in retirement, tears welled up in his eyes and he could hardly speak to acknowledge the approval of his industry. All he could say was that "I did what anyone else would have done." Now that I think about it, no one could have been more eloquent. I guess that is what is meant by "LAND OF THE FREE AND HOME OF THE BRAVE!" I will not soon forget my lunch with a hero.

WHO KNOWS AN EXPERT?

How many times have you heard that question around your office? Packaging, specialized machinery, chemical analysis, salvage issues — these are but some of the daily problems we all face. Wouldn't it be nice to know an expert to call? We think so, too.

Therefore, TLP&SA will establish an **EXPERT BANK** that members can use to find an expert. Have a problem? Go to **THE BANK**. It should be as simple as that. All of us know at least one or two experts that we use all the time. Now we will be able to share the wealth.

If you know a good expert, please either send the expert's name and resume to Headquarters or have the expert send the information directly to us. We will then be able to create a list of experts for the benefit of our members. THE NEXT TIME SOMEONE ASKS "WHO KNOWS AN EXPERT"? GO TO **THE BANK**.

This can only work with everyone's participation. **THE BANK** is only as good as the information we receive, so please contribute to the **EXPERT BANK** now. Remember, what goes around, comes around.

BARRETT BROUHAHA

Once again, the celebrated, self-styled "Consultant, author and educator..." Colin Barrett of Traffic World's "Q&A" column has placed his foot squarely in his mouth. Speaking as if he were the Tenth Justice of the Supreme Court, Mr. Barrett opined in his January 6, 2003 column that:

...no rational court...would support unilateral tariff liability limitations by (either motor or rail) carriers. [Barrett concludes] Which means, to me, your carrier's liability limitation is unenforceable, and in your shoes I'd either (a) set off the full amount of your claim against freight charges owing the carrier...or (b)...sue it for the difference. And good luck, though I don't think you'll need luck.

Needless to say, all "heck" broke loose. Our members were up in arms! Bill Pugh of the National Motor Freight Traffic Association weighed in as did many transportation lawyers. Not only did they disagree based on the law, they took Barrett to task for the "certainty" of his wrong opinion.

First, there is little question that a motor carrier may limit its liability under ICCTA, 49 USC 14706(c)(1)(A). The only issue would be the method required to accomplish that limitation and whether the carrier could have a so-called "flat value limitation" without a choice of rates. The cases to date certainly have sustained an inadvertence clause as where the carrier's bill of lading together with the appropriate tariff meet the Carmack Amendment's requirements for a written agreement between the shipper and the carrier. In those cases, the shipper would have the opportunity to declare a value or be bound by the limitation. See Hollingsworth v. Vose Company v. APA Transportation Corp., 158 F. 3d 617 (1st Cir. 1998); and Siren Inc. v. Estes Express Lines, 249 F. 3d 1268 (11th Cir. 2001).

The lingering question has been whether a carrier, under ICCTA, could have a flat value limitation such as an across the board $25.00 per pound. Based on the case of EFS National Bank v. Averitt Express, Inc., 164 F. Supp. 2d. 994 (W.D. Tenn. 2001) it would appear that such a limitation would be acceptable. Averitt holds that the bill of lading which shipper prepared was a sufficient "written agreement" between the parties under the amended Carmack Amendment to allow a motor carrier to enforce its tariff limiting its liability for lost or damaged goods. The bill of lading noted that the carrier's liability might be limited, and the tariff in effect on the date of the loss clearly limited the carrier's liability to no more than $25.00 per pound per package.

In response to the chorus of opinions to the contrary, Mr. Barrett wrote a unique column on January 27, 2003, purporting to modify his views. Nevertheless, it seems to us that Mr. Barrett is hung up on the whole concept of a limitation of liability. He discounts the cases brought to his attention, he refers to the U.S. Magistrate Judge who decided Averitt upon consent of both parties as "merely an employee of the court," and he brushes aside the legislative history set forth in the House of Representatives Conference Report which clearly states that carriers have the right to limit liability.

Even responses from Bill Augello and George Pezold were muted to say the least. Both agreed that under the law shippers can be bound by a limitation of liability. Bill suggested shippers lobby for a change in the law and George counseled to negotiate contracts. Neither gave any aid or comfort to Mr. Barrett.

So what do we make of this latest brouhaha? It is our opinion that shippers and carriers are best advised to understand the law as it is so they can make business judgments accordingly. In addition, as the U.S. Department of Transportation Liability Study done in August, 1988 observed, a knowledgeable shipper facing a limitation of liability has the opportunity to either choose to pay for a higher value from the carrier or to take out insurance to cover its full value loss. As some practical courts have done, we look to the business realities of the transportation system. For example, what is the freight rate charged? Has the shipper requested a copy of the carrier's tariff as required under ICCTA? Should a carrier who offers a $500.00 freight rate be expected to cover a million dollar loss when the Interstate Commerce Act allows the carrier to limit its liability? When looked at in these terms, perhaps it is the carrier who should be protected from overeaching shippers or from those "journalists" who purport to pontificate on the state of the law.

Stay tuned for BROUHAHA II.

TLP&SA FILES AMICUS BRIEF WITH THE SUPREME COURT

One of our stated missions is to "engage in legal and legislative advocacy on behalf of the membership." For many years, our members had lobbied ATA to support our legal position in court and to join other transportation companies when they had cases involving issues which affected the whole industry. These entreaties fell on deaf ears. Now that TLP&SA has charted its own course, we are proud to advise our membership that we are in the process of filing our first Amicus Curiae (Friend of the Court) brief in the Supreme Court of the United States.

In the case of Norfolk Southern Railway Company vs. James N. Kirby Pty D/B/A Kirby Engineering 300 F. 3d. 1300 (11th Cir. 2002), the US Court of Appeals for the Eleventh Circuit held that the rail carrier was not entitled to limit its liability for cargo damage under the ocean carrier's bill of lading because there was no privity of contract between the rail carrier and the ocean carrier. The Court held that the engagement of the rail carrier, not by the NVOCC but by the ocean carrier, excluded the rail carrier as one of the intended beneficiaries of the NVOCC's Himalaya clause. Norfolk Southern has filed a petition for certiorari with the United States Supreme Court. The TLP&SA Board voted to authorize James Attridge, Esq. of San Francisco, a member of our Board, to file an Amicus brief on behalf of our members and the transportation industry as a whole.

...TLP&SA takes the position that the Eleventh Circuit's decision is contrary to the public policy encouraging the seamless use of Transportation intermediaries...

TLP&SA takes the position that the Eleventh Circuit's decision is contrary to the public policy encouraging the seamless use of transportation intermediaries and that the decision undermines the risk allocation regime ordained by Congress which encourages the application of the limitation on carrier liability. We will make the brief available on our website as soon as it is filed.

This decision is even more troubling in light of the current United Nations Commission on International Trade Law, which is considering a proposed Convention dealing with door-to-door international shipments of goods. This proposal would do away with a carrier's right to contract and to limit liability with the party who hires the carrier and would bind the carrier to the terms of the contract between the shipper and the initial contracting carrier. (See Article on Secretary of State's Advisory Committee on Private International Law, page 5).

YOUR GOVERNMENT AT WORK, OR...

...WHAT HAPPENS IN YOUR NAME BUT BEHIND YOUR BACK

How many of you have heard of the UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW—PRELIMINARY DRAFT INSTRUMENT ON THE CARRIAGE OF GOODS BY SEA ACT? How many of you care? Well, you should care because this group is about to drastically affect your rights as motor carriers, and more importantly, they will affect your liability no matter what your contract or bill of lading says.

Most carriers are completely unaware of these proceedings. In essence, this new proposal would act as a codification of the Norfolk Southern Railway Company v. James Kirby case, 300 F. 3rd. 1300 (11th Cir. 2002). (See discussion of Kirby case and TLP&SA Amicus brief on page 4 of this newsletter). The Proposal would, among other things, limit any carrier except the original carrier in an international shipment from contracting for terms. Since the shipper only dealt with the original carrier, the Proposal prohibits any other party - Freight Forwarder, Broker, Motor Carrier, Rail Carrier, etc. - from forming a contract with its "shipper" which contract is different in any way from the original agreement. All these other parties would merely be "performing parties."

Such a transportation regime would severely curtail a motor carrier's right to contract and possibly upset existing commercial arrangements. What is more, such a change could take place behind our backs without carrier input.

TLP&SA recently found out about this Proposal and we are bringing it to your attention. It appears that Landstar had heard about this situation and filed a protest with the U.S. Department of State. We have spoken with the General Counsel for Landstar and obtained his permission to reprint his letter for all interested carriers (the letter appears on pages 6 & 7).

If you wish to submit your own response, please write to:

Mrs. Mary Helen Carlson
Attorney Advisor
Office of the Legal Advisor
Private International Law
Department of State
2340 E Street, N.W.
Washington, D.C. 200037

Docket No. MARAD - 2001 -11135

Dennis Owen
Vice President
General Counsel

14582-6

DEPT. OF TRANSPORTATION
DOCKETS

LANDSTAR

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August 20, 2002

Ms. Mary Helen Carlson
Attorney Advisor
Office of the Legal Advisor
Private International Law
Department of State
2340 E Street, N.W.
Washington, D.C. 20037

Re: Docket No. MARAD - 2001 - 11135 - 11

Dear Ms. Carlson:

Landstar System Inc. ("Landstar") wishes to submit comments to the Departments of State and Transportation on the "Preliminary Draft Instrument on the Carriage of Goods By Sea" currently the subject of deliberations by the Working Group III (Transport Law) of the United Nations Commission on international Trade Law ("UNCITRAL"). We understand that the purpose of this draft instrument is to provide the basis for an international convention which would, among other things, replace the U.S. Carriage of Goods By Sea Act ("COGSA"). Landstar only recently became aware of this instrument and the UNCITRAL process. We understand, however, that the Departments of State and Transportation will be participating in the next meeting of the UNCITRAL Working Group to be held in Vienna, Austria from September 16 - 20, 2002. We trust, therefore, that you will still have time to review and take into account our comments while developing the U.S. position for this meeting.

Landstar, through its subsidiaries, provides transportation services to shippers throughout the United States. As relevant to the UNCITRAL deliberations, Landstar provides motor carrier services to various steamship lines in connection with international intermodal transportation movements and is also a licensed non-vessel-operating common carrier.

Landstar is opposed to any inclusion of "performing parties" such as inland carriers in this draft instrument. The apparent purpose of the provisions dealing with "performing parties" is to uniformly bind all agents and subagents of the carriers that actually contract with shippers to provide transportation to a single international liability regime. In Landstar's view, the mischief caused by this approach far outweighs any of the potential benefits.

In the first place, adoption of a single "one size fits all" regime applicable to performing carriers such as Landstar would unnecessarily interfere with, and stifle, national solutions to issues of transportation contracting and liability. In the United States, for example, Congress has established a general liability regime for domestic transportation pursuant to the Carmack Amendment, 49 U.S.C. § 14706, while, at the same time, giving carriers and transportation users the freedom to contract for different liability standards tailored to meet the individualized requirements of specific transportation situations. In some cases, this leads to the adoption of liability limits higher than the ones proposed in the draft instrument. In other cases, and for good commercial reasons understood by both parties, the liability limits in individual contracts are lower than those standards. Secondly, the draft instrument, if adopted by the United States, would upset existing commercial arrangements and would reduce flexibility in future arrangements. It would also, of course, generate at least temporary uncertainty and changes in the transportation insurance industry, whose rules are well settled and understood by all participants in the United States. Moreover, the difficulties in amending international conventions[1] means that U.S.

[1] The failure to increase the Hague Convention $500 per package liability limitations in the years since 1924 is a good example of this.

lawmakers and regulators in the future would have less flexibility to adopt new solutions for ever changing commercial problems.

Further, extending the reach of this international convention to domestic transportation companies would not protect the consuming public. Holding the carrier that contracts with the shipper for transportation services liable under the Hague Convention and its progeny (COGSA, Hague-Visby, etc.) has worked well for many years. The primary problems with the existing rules are that the liability limits have not kept pace with inflation. Extending the heavy handed regulatory impact of an intentional conventional to domestic transportation service providers would, in our view, be a step backwards from the vibrant deregulated market that exists today, which has primarily benefitted shippers.

Landstar also opposes any attempt in drafting of this convention to distinguish between vessel operating common carriers and NVOCCs for liability purposes. Specifically, we oppose any efforts to allow vessel operators the exclusive right to decrease, or eliminate, their liability for cargo loss, damage or delay in private service contracts with their shippers without extending the same privilege to NVOCCs. As you are no doubt aware, the United States Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, entitles vessel operating carriers to enter into "service contracts" with their customers, a privilege not extended to NVOCCs. This Act, however, has nothing to do with cargo liability issues and does not represent a Congressional determination that NVOCCs and vessel operators should be treated differently for liability purposes. In fact, NVOCCs and vessel operators have always been treated equally under COGSA. Therefore, any provision in an international liability convention limiting a carrier's ability to reduce or eliminate its liability exposure exclusively by means of a service contract - - or any other instrument from which NVOCCs are legally excluded in participating - - would be unfair and discriminatory and would derogate from principles of equality between NVOCCs and vessel operators that have been long settled by U.S. courts interpreting COGSA.

Thank you for this opportunity to provide comments. We would be happy to discuss them with you if you wish. Please add my name to any mailing list you are keeping for the purpose of communicating in regards to this process.

Sincerely,

Dennis Owen
General Counsel

cc: Edmund T. Sommer, Jr.
Chief, Division of General and International Law
Office of the Chief Counsel
Maritime Administration
Department of Transportation

WHAT DO A REPUBLICAN CONGRESS, TORT REFORM AND CARRIER LIABILITY HAVE IN COMMON?

Throughout literature, as well as in the real world, the number three appears to have substantial significance. Concepts such as triumvirate go back to ancient Rome; in religion you have the trinity; and even those who studied Latin remember that all Gall was divided into three parts. So what do a Republican Congress, Tort Reform and Carrier Liability have in common? Perhaps they represent a further balance between personal and corporate responsibility.

As a trial attorney, I have sensed a shift in juror reaction to an overstated plaintiff's case. I have been heartened by judges who look critically at the facts and are not afraid to dismiss complaints that do not even pass the smell test. I read about state legislatures which are considering balancing the public good with practical protections for business and industry. Notice the THREE observations.

With the recent shift of power in the Congress, I suspect that there will be a reevaluation of the Tort system. The trucking industry has long lobbied for such an undertaking since lottery-like jury awards skew the numbers, raise the insurance rates and in the long run adversely affect business as a whole. While some businesses can pass along increases to the consumer, the trucking industry is engaged in a such a competitive environment that increases serve only to erode the bottom line and eventually destroy the business itself, as observers of Consolidated Freightways and APA can well attest.

But plaintiffs' attorneys lobby hard and say they are championing the constitutional rights of the American people to trial by jury and fundamental fairness. They fail, however, to mention the outrageous jury awards such as the ones against McDonalds and the enormous contingency fees that in some states go to 40 or 50 percent plus costs. From a trucking industry point of view, few plaintiff's attorneys recognize the recent studies that conclude a significant amount of vehicle accidents involving trucks are caused by the driver of the car. So where do we find fairness? Should a Republican Congress merely pass laws to swing the pendulum all the way to the other side? What is just compensation for loss?

First, we should agree on some basic principles. Everyone must take responsibility for their own actions. Those who are injured or whose property is lost or damaged due to the fault of others should be fairly compensated. Insurance should be reasonably attainable to cover all or part of any foreseeable risk for either party.

Second, having agreed to the basic principles, it must be determined how the system should be balanced so that awards are predictable and fair within a range which can be provided for through a calculated risk analysis. Does "capping" awards for pain and suffering solve the problem or is a worker's compensation system the answer? We suggest that, unfortunately, there is no easy answer or complete panacea to cure the dilemma. Nevertheless, most fair-minded people will agree that the present tort system is in disarray. Unless we work for reform, it will act as a cancer on our economy.

All this leads to the THIRD point, which is what can carriers do to help Congress move the process of tort reform forward? Clearly, carriers must lobby their representatives and provide statistics which demonstrate the harm caused by runaway juries, outrageous verdicts, punitive damages and a complete failure in some instances to recognize the clear negligence of the plaintiff. We must suggest that judges be encouraged to throw out frivolous cases at an early stage to minimize defense costs and for those same judges to take quick and decisive action to cut awards that bear no relationship to the harm suffered. Courts should engage in meaningful Alternate Dispute Resolution, where they appoint knowledgeable intermediaries to resolve cases in a fair and balanced way. In order to lend support to Alternative Dispute Resolution, the courts should be allowed to consider fee shifting to those plaintiffs and their attorneys who turn down reasonable settlement offers after recommendations by both the intermediary and the court, and then obtain less than the offered amount from a jury. Congress should also consider a cap on pain and suffering awards with a provision that the plaintiff may move to set aside the cap based on compelling evidence of "extraordinary" pain and suffering.

These are but some suggestions to address the growing problem. But the joint concepts of fairness and predictability will go a long way to help business, bring down insurance premiums, and speed a financial recovery to victims who truly deserve it. So, whether one is a Republican or Democrat, meaningful tort reform will help carriers as well as the economy in general. Wouldn't that be a consummation devoutly to be wished?