

TRANSTRENDS



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FUEL LINE

Each issue we will feature as the first item the **FUEL LINE** which will alert you to those states that are planning tax increases, toll hikes and other fees.

TAXTRAK CLIENT ADVISORY

We expect all IFTA jurisdictions to begin enforcing timely data entry. What that means is that trips generated during a particular month are to be reported in that month. Therefore, please make sure that you make every effort to send in trips sheets every two weeks in order to allow adequate entry time. And, please, if we call your office to remind you of this obligation don't get mad at us. After all we are just the messenger. On time reporting will reduce or eliminate penalty and interest as well!

VERMONT BILL WOULD BOOST STATE'S FUEL TAXES

A Vermont House panel has endorsed increasing the state's per gallon taxes on gasoline and diesel by 6 cents. That would mean a 24 percent increase in the per-gallon tax on diesel bringing the tax per gallon to 31 cents. The measure isn't expected to become law, however, because the governor has said he is opposed to increasing taxes for any reason this year.

The tax increase would generate \$26.5 million a year and this amount is \$2 million more than what would be needed to cover shortfalls in Vermont's current tax stream that pays for road and bridge work and meet federal guidelines for the state to claim additional transportation funds.

We are certain that the governor will be persuaded to go along with the tax increase, after all, is there a public official who is not disposed to raise fees for truckers?

NEW YORK SENATE ACTS TO CUT STATE FUEL TAX

The New York Senate has approved a measure designed to ease the spiraling cost of motor fuels in the state. "The state has been profiting from the rise in gas prices because higher prices mean higher gas taxes," Senate Majority Leader Joseph Bruno, R-Brunswick, said in a recent statement on the bill. "The Senate plan would cap the tax, reduce the cost of (motor fuels) at the pump and limit the impact on consumers' wallets."

Senators approved the measure during a one-day special session this past September only to see it fail to receive consideration in the Assembly, effectively killing it for the year. Once the 2006 legislative session kicked off last month, the effort was restarted in the Senate and sent back to the Assembly for debate.

Let us hope for once that a group of legislators does the right thing. The MA DOR should consider a similar proposal on the excise tax related to the off road usage. The MA DOR is making a "ton" of money on a tax that at one time represented the true amount that was considered reasonable. In effect the tax is probably 2 and one half times the original intended amount.

COUNTY AND BUSINESSES SUE THRUWAY

In what could prove to be a precedent-setting case, county officials and private businesses near Buffalo, NY, have banded together in a lawsuit against the New York Thruway Authority, claiming the Thruway's tollbooths have cost the area economic development.

Erie County Executive Joel Giambra and local businessman Carl Paladino have teamed up to file a lawsuit against the Thruway, alleging that the South Ogden and Breckenridge toll booths on Interstate 90 discourage economic growth in downtown Buffalo. Originally, tolls on the road were to end after the original bonds that funded the project were paid off in 1996. However, Thruway officials later changed that and said users of the road, not all of the state's taxpayers, should pay for its upkeep. "It's time to go to the courts and ruffle some feathers," Paladino told Business First. "We've been hearing the booths are coming down for the past 30 years. They are truly a barrier to development in our city."

The trend for toll booths is not to tear them down but to add more booths. Connecticut is considering putting tolls booths on the Connecticut Turnpike after a 25 plus year absence. Very few taxes ever come to an end and after all a toll is just a tax.

NO SKID ZONE

Bill O'Reilly may have the "No Spin Zone" but the Translaw Group has the "No skid Zone". Each issue will highlight the absurdity of a particular rule, regulation, law or government action that just doesn't make common sense.

IT TAKES GUTS

LITTLE ROCK, Ark. (Reuters) - Emergency service workers had their stomachs turned when they cleaned up a smelly mess of spilled pig innards that blocked a busy Arkansas intersection for several hours on Tuesday. Police said a truck spilled about a half ton of hog intestines fresh from a packing plant. The mess in the state capital, Little Rock, left several cleanup workers queasy. "It was horrible. Oh, it was bad," said Sgt. Terry Hastings of the Little Rock police department.

The truck was carrying the entrails from a rendering plant to a facility where dog food is manufactured when the driver made an abrupt stop. The container was covered only by a tarp, which did not prevent the viscera from sloshing into the crossroads, police said. Firefighters used bleach and fire hoses to flush away the mess. When asked to describe the scene, Hastings was almost at a loss for words. "Nasty, nasty. Phew," Hastings said.

Translaw Group Inc. is surprised that anyone even noticed this kind of mess in a Southern urban area of commerce and industry.

DRIVER PLEADS NOT GUILTY IN FATAL CRASH

Truck Driver Michael John Kozlowski was involved in a fatal crash with a school bus in October 2005 has pleaded not guilty. Prosecutors added five counts of felony reckless driving and three misdemeanor counts to the charges Kozlowski faces. Kozlowski was already charged with five felony counts of homicide by negligent operation of a vehicle, 11 felony counts of reckless driving and nine misdemeanor counts of reckless driving.

The charges stem from a wreck that happened when Kozlowski allegedly lost control of his truck, causing it to overturn and jackknife in the middle of Interstate 94 near Eau Claire, WI. Five people were killed. The prosecution charges that Kozlowski had been out partying that night and fell asleep at the wheel while Kozlowski maintains that he was trying to pull his truck off the side of the road to go to the bathroom when he hit some soft ground and lost control. However, a witness has testified that he had seen Kozlowski driving on the night in question and that his truck had swerved to the right and repeatedly drove over the rumble strips along the highway.

Damned those eye witnesses!

FOUR GROUPS JOIN OOIDA IN HOS COURT CHALLENGE

Four groups have joined the Owner-Operator Independent Drivers Association in a legal challenge of the revised hours-of-service regulations for truck drivers. OOIDA filed a court challenge earlier this year requesting that the U.S. Court of Appeals for the District of Columbia Circuit review HOS – specifically, rules involving the 14-hour on-duty clock and split sleeper-berth provisions.



Now, the International Brotherhood of Teamsters, the Truckload Carrier's Association and the Ohio and California Trucking Associations are supporting OOIDA's court challenge and have filed "motions to intervene" in the petition for review.

There is a lot of political muscle behind the suit but you just cannot tell what the courts will do. There are several public interest groups that still feel that the hours of service rules allow for too many hours as it is.

FMCSA APPOINTS FIRST MEDICAL REVIEW BOARD



Five medical professionals now form the first-ever FMCSA Medical Review Board. U.S. Secretary of Transportation Norman Y. Mineta named the five doctors who will serve on the Medical Review Board, according to a Department of Transportation press release. FMCSA is planning updates to physical qualification regulations of commercial motor vehicle drivers and the board will provide the necessary science-based guidance to establish realistic and responsible medical standards. Each medical professional brings specialties to support FMCSA's agenda, according to the release. The

following individuals were named to the Medical Review Board:

- Dr. Gunnar Andersson, senior vice president for medical affairs of Rush University Medical Center, and professor and chair of orthopedic surgery;
- Dr. Michael Greenberg, associate director for medical toxicology at Drexel University College of Medicine and director of the medical toxicology fellowship program;
- Dr. Kurt Hegmann, director and associate professor of Rocky Mountain Center for Occupational and Environmental Health, Department of Family and Preventive Medicine at the University of Utah;
- Dr. Barbara Phillips, chair of the National Sleep Foundation and professor at the University of Kentucky College of Health in the Department of Preventive Medicine; and
- Dr. Matthew Rizzo, professor of neurology at the University of Iowa College of Medicine.

Board members are appointed to a two-year term and are eligible for reappointment based on FMCSA's needs at the time. According to the release, criteria for appointment includes medical expertise in a medical specialty, an understanding of research methods, knowledge of transportation medical issues, experience on panels that develop medical standards, a record of scientific collaboration, professional service and experience developing teaching programs.

Expect to see some new and very tough standards that will be introduced and, further, expect to see a registry of doctors who will be the only persons eligible to perform US DOT physical exams. Such exclusivity only means higher costs for the traditional DOT physical exam.

BUSH NOMINEE TO HEAD FHWA SUPPORTS TOLLING U.S. ROADS

President Bush's nominee to head the Federal Highway Administration is a staunch supporter of increased tolling and foreign operation of U.S. highways and other infrastructure. J. Richard Capka, is to succeed Mary E. Peters as administrator of the FHWA, has been deputy administrator of the agency since August 2002.

During his time at FHWA, Capka helped the Bush administration shape the current highway funding legislation, known as SAFETEA-LU, and has championed the president's pursuit of privatization of U.S. roads and other infrastructure. Bush tried to put this concept into play with the ports deal which we now know has failed and miserably at that.

In his discussion of SAFETEA-LU, Capka has stated that one of the key provisions "gives states more flexibility to use tolling to finance infrastructure improvements." Looking toward the next version of the highway funding legislation, Capka said: "Federal law still contains a bias against tolling for many roads. This may disappear ..."

Capka was chairman of the Massachusetts Turnpike Authority and had oversight of the Big Dig tunnel project in Boston. A spokeswoman for the turnpike authority stated that Capka was chairman from "early 2001 through August 2002," but she could not provide the specific dates of his employment there.

Need we say more! Anyone involved with the Big Dig should not be put in any position to influence road and highway policy. For proof, just look at the Big Dig!

DUBAI PORTS WORLD AGREES TO GIVE UP MANAGEMENT OF U.S. PORTS

Dubai Ports World has agreed to turn over operations at U.S. ports to a U.S. entity. There was no word as to what entity, as of press time but speculation has it that the venerable Halliburton will be the lucky winner. A controversial takeover of the British firm of Peninsular & Oriental Steam Navigation Co. would have given Dubai Ports World – which is owned by the United Arab Emirates – control over operations at 21 U.S. Ports.

Perhaps had George Bush taken a lead on what we now learn to be a very important foreign policy decision and laid the necessary ground work to inform the public of the specifics of the deal he would not have gone down in flames. Initial reports had the public thinking that Bush sold off a substantial amount of waterfront real estate, equipment, buildings and related infrastructure which is not the case. Just another example of trying to ram some program down the throats of the public.

PENNSYLVANIA OFFICIAL TOUTS PRIVATIZATION OF ROADS

A Pennsylvania state representative believes the idea of road privatization might be one way to improve the state's highway system and reduce taxpayer maintenance costs. Rep. Richard Geist, R-Blair, chairman of the House Transportation Committee, has stated that public-private partnerships for roads have worked in Europe and are becoming increasingly popular among lawmakers in the U.S. Pennsylvania, like most states, is cash-strapped for highway dollars.

Many of these privatization moves with foreign entities are going to fall short of public acceptance. The public has a new awareness of what is going on around them after the US ports fiasco. See related story above.

TRUCKING COMPANY OWNERS BROUGHT UP ON CHARGES

The owners of an Albuquerque, NM, trucking company have been charged with failing to register vehicles, failing to keep logbooks and failing to have drug and alcohol procedures in place. And felony fraud charges could be on the way, according to the state Department of Transportation. KOB-TV reported that the charges stemmed from a complaint lodged by a former employee of the company. The employee charged that owners Ernest and Henriette Montoya falsified a medical card when the driver's authentic medical card expired.

The employee said Ernest Montoya simply pulled a blank card out of his desk and signed his name to it, then put a copy of the forged card in the employee's driver qualification file. Investigators served a search warrant on the company and seized medical examination reports and blank medical cards from the building.

Sounds like a nifty way to keep your qualification files updated at the lowest possible costs.

F. O. B., WHAT DOES IT MEAN

The term "F.O.B. origin" or "place of shipment" or the term "F.O.B. destination" or "place of destination", is often misused by shippers and receivers alike. These terms are to be differentiated from the terms "prepaid" and "collect" which refer only to the party responsible for the payment of freight charges.

F.O.B. place of shipment (or "origin") - U.C.C. 2-319 provides that where "F.O.B. place of shipment" is specified, the seller is bound to ship the goods at that place and bears the risk and expense of putting the goods in possession of the carrier. Thereafter, the risk of loss is on the buyer.

F.O.B. place of destination - When the term is "F.O.B. place of destination", the seller must transport the goods to that place at his own risk and expense and tender proper delivery. Thus, the risk of loss is on the seller during transit. The term used determines who has the risk of loss during transit and the correct usage of the term is very important when the consignor or consignee wants to be free from cargo loss and damage during transit.

The first step in any claims case is to ascertain who has risk of loss in transit, This concept is significant because it determines who has the legal right or obligation to file the claim, and who is the proper "party in interest" in the event of litigation. In practice, claims are very often not filed by the party who has risk of loss. For example, a large shipper which has an experienced traffic department may file claims for its customers as a courtesy or service. However, if the shipper does not bear risk of loss for the shipment, it has no legal obligation to file the claim.

Under common law and the old Uniform Sales Act, which has been replaced in all states by the Uniform Commercial Code, risk of loss generally followed "title" to the goods. Under the Uniform

Commercial Code, risk of loss is related to "delivery" of the goods. While the parties may specify otherwise in the contract of sale, there are certain presumptions, based on the "terms of sale" used.

Caution is in order where the contract is silent, or there is no written purchase order, invoice, etc. The general rule is that risk of loss passes to the buyer upon delivery to the carrier at the place of shipment. The custom and usage of the particular trade or business are also relevant in determining risk of loss in such situations. A common misconception is that the party who pays the freight is the one who has risk of loss in transit. This is not true; always refer to the "term of sale" in the contract to determine who has risk of loss.

A shipper, therefore, who wishes to insulate itself from risk of loss while the goods are in transit should ship all goods "F.O.B. origin". It does not matter who pays the freight charges, however, a shipment designated as "F.O.B. origin" with prepaid freight charges should be evidenced with underlying documents with the actual "terms of sale" set forth in a sales contract or purchase order or some other similar document between the consignor (shipper or seller) and the consignee (receiver or buyer) that set forth the terms of the sale and the fact that the shipment was intended to be "F.O.B. origin".

Certainly, the term of sale should indicate that the shipment is "F.O.B. origin" which means that the consignee (receiver or buyer) has the risk of loss in transit. Should there be any further questions concerning this Transportation Law Advisory, please do not hesitate to contact this office for further discussion.

AVOID PAYING TWICE

It's the same old story. A broker selects a carrier to move a load. The carrier submits a bill to the broker and the broker pays the bill. A few weeks later the broker gets another bill from some unknown carrier. After a little investigation on the broker's part it is learned that the first carrier co-brokered the load to another carrier.



You guessed it, the original carrier who billed the broker, cashed the check, passed the load off to another carrier who passed it off to another carrier and the final carrier now wants to be paid and can't get any money out of the party that pass off the load and decides to send you a bill. After all, the last carrier is the one who did all of the work.

QUESTION: Do you owe the delivering carrier for moving the load even after you paid the carrier that you had a contract with and that you thought had moved the load.

ANSWER: The answer is yes and no!

What generally happens is the final delivering carrier will contact the original broker's shipper and demand payment. Naturally a broker never wants a carrier to make such a demand on its shipper. This is particularly true when the broker simply held his end of the bargain and paid its original

carrier. At this point the broker will generally opt to pay, again, rather than have his shipper subjected to litigation.

SOLUTION: There are a few things that a broker can do to reduce or eliminate the problem of paying the wrong carrier.

1. The B/L should be made out in the name of the broker and not the broker's shippers name.
2. The contract between the broker and shipper should contain the proper language to delineate an independent contract status between the two parties. Very few brokers have contracts with their shippers, but they should.
3. Don't pay your bills so fast! Wait until the POD (see related article below) is mailed, faxed, or emailed and find out the name of the actual delivering carrier. See if the name on the POD matches the name of the carrier who is submitting the first bill. If the names are different – Houston, we have a problem; you can expect a second bill to surface in a few weeks time.

It is at this point that you must determine who should be paid. If you pay the wrong party you stand a good chance of having to pay twice. The related article on POD's will give readers an insight into the value of the POD on the part of the broker or shipper. All too often shippers rely on POD's for internal purposes rather than to do their own "work". However, when viewed in the context of the broker requirements, a POD can be his best friend when determining if the work got done and who did the work.

REQUIREMENT TO PRODUCE A "PROOF OF DELIVERY"

Far too often consignees demand a Proof of Delivery (POD), before they will pay a freight bill or invoice for the goods.

The entire matter of POD's seems somewhat of a ruse on the part of the party paying the freight bill. Is it simply a method to delay payment or an effort to require the broker/carrier to do the record keeping for the consignee's receiving department?

The consignee knows exactly what they received and any company with a rudimentary receiving/dock operation already has the records it needs in the way of inventory entries, purchase records and other in-house documentation to determine if a shipment was received versus the invoice the consignee receives from 1), the carrier and 2), the consignor.



The requirement of producing a POD is a senseless process when one thinks of why such a document is really required. It is usually done to delay payment of invoices for the goods and for the transportation and to solve the inefficiencies of the consignees' receiving department to require the carrier prove what the consignee already knows or should know. However, brokers may want a

POD in order to determine who actually delivered the goods. This is particularly helpful when a load is unknowingly co-brokered (once or even twice removed). See related item on "DON'T PAY TWICE".

There is no requirement in the law for such a document.

Aside from the delay in payment while awaiting the production of the POD the additional problem arises when the POD is lost or was not properly secured causing even greater delays in payment. Or, worse yet, perhaps no payment at all with the thinly veiled justification that the carrier was not able to provide proof that it delivered the goods.

One can simply refuse to produce the POD and demand payment; however, such a scenario will most likely end in court action with the carrier trying to collect its invoice and the consignor trying to collect its invoice for the "missing" goods. Again, in such a court action the carrier will ultimately have to prove that delivery was made if the consignee continues to claim it did not receive the shipment thereby refusing to pay for the goods and the freight charges.

Suggested solutions would be...

1. Consignor changes its payment period to start running from the submission of the invoice for the goods. The affect of this procedure would cause the consignee to perhaps miss out on any discounts for early payment while waiting for the POD or perhaps paying the invoice without the POD. Most likely the consignee already knows that it received the goods.

We must keep in mind that there are those rare occasions that delivery is not made and the goods are either lost or stolen or converted. It would be my guess that the POD in almost every instance is simply another document that the consignee collects and never looks at when paying invoices. By the time it pays its invoices, the consignee already knows which invoices match with goods already put into inventory, etc.

2. The consignor could ship everything COD thereby collecting all of its money before delivery is affected. This in not very practical but certainly would eliminate the need for a POD.
3. The consignor could ship FOB origin (consignor facility) and support the invoice with a copy of the Bill of Lading thereby causing the consignee to secure its own POD from the carrier. Title to the goods passes at the origin and the consignee becomes title holder of the goods that are loaded onto carriers' vehicles. The consignee would have to address the issue of POD with the carrier and the consignor would not be in the "loop".

I do not believe that the above information is truly that helpful, but is should be enlightening. It is difficult to get organizations to change terms of sale, terms of shipment and so forth. People are truly reluctant to change.

I believe that if you are having substantial difficulty with one or two consignees it might be best to review the delivery process and to determine why a POD is difficult to secure. If the problem lies

with a particular motor carrier a review of that carrier's procedure would be in order. The issues surrounding the POD should be addressed in the contract carrier agreement with each carrier. Some type of penalty or assessment should be addressed when a carrier fails to provide the POD. Such action will not solve the problem but will make all parties aware of the importance of securing the POD.

There should be an agreement between the broker and the consignor wherein this issue is appropriately addressed. It should be noted that if an original POD cannot be produced, a photo copy should be sufficient for the consignee to check its records to verify what they most likely already know, that they did, in fact, receive the shipment. Certainly an original is preferable to a copy of any document; however, when the original is not available the copy is the next best evidence and should be acceptable to all parties. A copy can be accompanied by a verified statement as to the authenticity of what the copy represents and an indemnification can be included should the copy subsequently prove to be bogus or simply unreliable.

In the absence of a POD other documents such as a statement from the consignor indicating that the goods were in fact delivered or a statement from the driver indicating that the delivery was made or other records of the carrier may indicate that the delivery actually took place.

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