

# THE Logistics Journal

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## THE LAW AND YOUR BUSINESS

### Freight Held "Hostage"

By Ronald H. Usem, Esq.

**Nothing makes blood boil faster than a carrier telling a broker/shipper/freight forwarder, that it will not deliver freight in its possession until some outrageous demands are met.**

Most commonly, the carrier is demanding payment for shipments preceding the one currently in progress, although the range of "reasons" for withholding delivery is extremely wide. In most situations the broker or freight forwarder will try to protect the shipper customer by "negotiating" a solution that will satisfy the carrier so that the shipment can be delivered. Assuming delivery can be negotiated, broker, freight forwarder or shipper can take legal action for costs, expenses and damages resulting from breach of contract. If delivery cannot be negotiated, broker, freight forwarder or shipper can take legal action: to obtain possession of the shipment

(known as an action in replevin), and/or action for "conversion" for the value of the freight, for breach of contract.

In many instances excited calls are made to police officials reporting theft. However in most cases the carrier has obtained the shipment legally. When that happens and the carrier refuses delivery, the carrier has "converted" the shipment. Conversion is another term for civil theft. Police departments, including the FBI, typically are dealing with more serious crimes and/or national security issues and do not have the resources or interest in processing freight related issues. Courts have defined "conversion" (this has nothing to do with religion) as:

"Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion. While therefore it is a conversion where one takes the plaintiff's property and sells or otherwise disposes of it, it is equally a conversion if he takes it for a temporary purpose only, if in disregard of the

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plaintiff's right... The word "conversion" by a long course of practice has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of his dominion over them...Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein...Conversion may be proved by demand and refusal of possession but evidence of this is not necessary if there is other evidence of actual conversion."

"In short, the substance of the tort is wrongful dominion over the property of another."

The elements of conversion are (1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages. *Matsuda v Wada* 101 F Sup 2d 1315 ( US Dist Ct Hawaii,1999). (Refusal to deliver bill of lading to a sailboat.)

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A sudden assertion of a lien against the goods, midway en route, to resolve a dispute between the motor carrier and another party cannot justify converting property which has been purchased by the buyers.

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The case of *Car Transportation v Spot Distributors* 805 SW 2d 632 (Ark. 1991) is instructive. In this case the motor carrier agreed to transport goods for the sellers/shipper and loaded the goods in California. While in transit to the east coast, the truck broke down in Arkansas. At that time the motor carrier discovered that the sellers owed it money for previous trucking services (\$9,000.00). The motor carrier demanded payment (\$15,000.00) from the sellers to repair the truck. The sellers refused payment, whereupon the motor carrier refused to deliver the goods to the buyers and stored them in its place of business in Arkansas. Buyers, which included Spot had prepaid for the goods. Another buyer upon learning that the carrier refused delivery, rescinded his contract to purchase. The court held that the issue of who the actual owners of the shipment were (sellers or buyers) was irrelevant to the outcome; it also held that the question of the carrier's intent was irrelevant.

According to the court, "...Accordingly, when the motor carrier withheld the goods from the buyers, it converted those goods as readily as if it had appropriated goods which clearly belonged to another. Because we hold again today that withholding goods from those entitled to possession constitutes conversion, it is not necessary for us to address the other issues relating to ownership which were raised by the motor carrier in its appeal."

The carrier also claimed as a defense that it had a lien (under the Uniform Commercial Code Sec 7-307(1)) for the transportation of the freight. The UCC provides for a carrier lien as follows: "(1) A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. The court took a dim view of the carrier's argument by stating, "...If a lien defense is available to the motor carrier, it can only be asserted against currently transported goods for current freight charges that remain unpaid." Further and most importantly, "...A sudden assertion of a lien against the goods, midway en route, to resolve a dispute between the motor carrier and another party cannot justify converting property which has been purchased by the buyers."

In another more recent case, *Progressive Timberlands v R & R Heavy Haulers and Burwell* 622 NW2d 533 (MI App 2000) the facts were as follows: In September 1998, plaintiff hired defendant R & R Heavy Haulers, Inc., (R & R) to move three pieces of equipment between two locations where plaintiff was clearing land. R & R took possession of the items but failed to deliver them as agreed. Plaintiff contended that defendant Rodney Burrell, an employee and principal of R & R, informed plaintiff that R & R was retaining the equipment because of outstanding invoices that were overdue for delivery services previously rendered. Plaintiff made a partial payment on the outstanding invoices, after which defendants returned two pieces of equipment to plaintiff but retained the third piece, a "bunching saw" that plaintiff claims was essential to the operation of its business. In November 1998, when defendants had still not returned the saw, plaintiff sued defendants, alleging conversion and seeking both the return of the saw and damages for lost use of it. Defendants argued that under Michigan statutes R & R was properly holding the saw under a carrier's lien for the amount plaintiff owed defendant for transporting the three pieces of equipment. Defendants denied that Burrell told plaintiff that R & R was retaining the equipment against plaintiff's will

because of unpaid prior debt. Additionally, defendants alleged rightful possession of the saw as a result of an agreement with plaintiff that the saw would remain with R & R until the resolution of ongoing negotiations regarding the remaining unpaid debt. After citing the Car case above, as well as other authorities the court stated, ".....These cases indicate that (1) statutes analogous to {the Michigan lien statute} do not create a carrier's lien for past due charges; and (2) if a carrier attempts to assert a carrier's lien for past due charges, it may be held liable for conversion even if it also asserts a lien for present transportation charges. We agree with these holdings and hereby incorporate them into Michigan law." Because of material fact issues, the case was sent back to the trial court for further proceedings.

What does this mean for your business? Under facts situations similar to those above, where the carrier is refusing delivery because of an alleged prior debt, you may be able to tell the carrier to keep the freight and pay you its value for "conversion." While there are a thousand other reasons why carriers withhold delivery, which may make them liable for "conversion," the space allotted for this article only allows dealing with one of the more common types of cases.

Most business people would prefer not to get into business arrangements where they have to resort to litigation to resolve disputes so it is important for TIA members to take advantage of the "Watchdog" program. By reporting carriers who have converted freight ship-

ments, you may be able to avoid (and help other members avoid) getting into relationships with a carrier that ends up at the courthouse. This reporting service has become more and more useful in helping members avoid major headaches with carriers. Since September 2005, 130 reports have been filed. Several new features have been added which makes it more user friendly including: MC numbers are added monthly so the newest companies can be found; Watchdog account holders can view all reports at one time; reports are listed alphabetically so it is easier to find a specific company. Watchdog has become an important tool to enable members to make more informed decisions before entering into business arrangements. Use it as part of your carrier qualification process. You will be glad you did!

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TIA members can report carriers that hold loads hostage on Watchdog. For your free Watchdog account, please contact Ms. Jessica Mizell at [mizell@tinet.org](mailto:mizell@tinet.org), 615-599-9263.

**WATCHDOG** 

## CHAIRMAN'S CORNER

# TIA Looks Forward and Moves Forward

*By Daniel T. Yoest*

Leaders from all segments of the transportation industry found our 2006 Fall Meeting in Ft. Lauderdale, Fla. in conjunction with NITL and IANA both educational and rewarding.

While there, the TIA Board of Directors met to plan TIA leadership initiatives in our industry and took steps to provide TIA members with the best value for their membership dollar. They approved a new Member Referral Award Program to begin on January 1, 2007 where two awards will be issued at the 2008 TIA Convention. These awards will be given to TIA members who refer the most new members: one to a Regular

Member and one to an Associate member. Membership continues to grow, and as of this writing we have (1,054) member companies providing services to all segments of transportation.

One of the major topics decided by the Board was the establishment and approval of Carrier Qualification Guidelines. Due to recent court rulings, 3PLs have been drawn into the liability spotlight on personal injury truck accidents. The so-called "Schramm" case created the potential of exposing any 3PL or broker that does not diligently review and follow their carrier qualification policies to liability for "negligent hiring." The guidelines approved by TIA provide guidance in a cafeteria style of items. 3PLs and brokers need to carefully review these and then set up their own formal corporate policies for implementation. Failure to do anything, or following sub-standard corporate policies, could jeopardize the future of any company that might be drawn into a personal injury case.

The TIA Model Contract Committee reported good

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