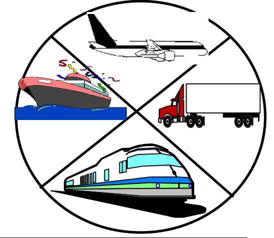
Rollin' On™ . . .



A Facsimile Newsletter for the Transportation Industry

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HALLOWEEN HAUNTINGS:
More Undercharge Claims

Just when many thought that the undercharge scoundrels had been dispatched to making a living in the real world, they have reared their ugly heads for yet another run at "fleecing more sheep" (to use their own words). Before we discuss these current developments, let's take a look at the recent changes in the law.

Congress passed the Negotiated Rates Act of 1993 into law not quite two years ago. Among other provisions, the NRA shortened the statute of limitations from three years to two years, with a further reduction to one and one-half years on shipments moving after December 2, 1994. Congress later passed the Trucking Industry Regulatory Reform Act in August 1994, which, of relevance here, eliminated the filing of tariffs by most carriers, thereby substantially gutting the so-called filed rate doctrine that created the undercharge crisis in the first place. Subsequently, there has been a noticeable, sustained sigh of relief from shippers, third parties and even carriers, who are vulnerable on interline shipments.

However, bankruptcy law allows the trustee two years from the date of filing bankruptcy to file lawsuits on claims such as undercharges. That means that a trustee, through contingency arrangements with collection attorneys and freight auditors, can file a lawsuit at this time for claims for a bankruptcy case filed in late 1993,

The Obligatory Disclaimer
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LAWRENCE R. DAVIDSON
Attorney at Law
1850 Benj. Franklin Plaza
One SW Columbia St.
Portland, Oregon 97258
(503) 229-0199
Fax (503) 229-1856
Internet: rollinon@teleport.com

and reach back to shipments that moved as early as December 1990.

That is exactly the scenario for the bankruptcy case of Superior Fast Freight, Inc. a former California carrier. Several shippers have recently received dunning notices from Superior's undercharge attorneys, claiming that the shipper is liable for the claim and offering to settle for some specific amount by some specific date. Some of the notices even have a form of complaint attached to them, thereby further threatening the shipper if payment is not received as demanded. The demand letter, several pages in length, goes on and on about how strong the case is and sends a message that the shipper should roll over instead of resisting payment.

If the demand letter looks like a good piece of work, it should. The authors are the same individuals that filed the lawsuits in the *Transcon* cases. Their track record is littered with losses, with little or no successes. As many of you know, the Ninth Circuit Court of Appeals rejected Transcon's shipper code claims, and the United States Supreme Court refused to hear the case. Then, on January 10, 1995 the Supreme Court ruled against the *Transcon* attorneys on their loss of discount/late payment claims [*Rollin' On, January 1995*]. Finally, just three months ago, on July 10, the Ninth Circuit Court of Appeals again ruled against this illustrious group when the Court held that the NRA applies to the *Transcon* cases.

We are fortunate in that these cases have been rendered either by a court in the Ninth Circuit, which covers the western states, or by the United States Supreme Court. A decision from a Ninth Circuit court is binding on all cases filed in the Ninth Circuit until it has been reversed or modified by the Supreme Court. Therefore, the bankruptcy court that will hear the Superior Fast Freight cases must follow these precedents. In turn, this means that this bankruptcy court will not be required to reinvent the wheel to decide the issues discussed above, whereas the *Transcon* bankruptcy court had to deal with many questions of "first impression", such as shipper codes, late payment/loss of discounts, and the NRA. The Superior proceedings should therefore move along much more quickly and efficiently. The collection attorneys presumably want

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Shared responsiblity
is no one's responsibility.

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to collect as much as possible before they file the lawsuits, as the prognosis in court should be bleak.

There is also a serious issue as to whether Superior was acting as a freight forwarder as opposed to a common carrier, further weakening the trustee's claim. Let me know if I can be of assistance in these claims, as they can be handled economically.

That's all for now. To shippers, carriers, agents and other third parties, keep the cargo rollin'!!

Short Bio
Admitted to the bars of the states of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 15 years and emphasizing transportation law, business law and related litigation.