

## MINIMIZE YOUR BAD TOWING EXPERIENCES

*By Jerry Swift*

We all have heard stories of bad experiences truck companies have had with towing/recovery services that have been called to assist when a truck has become disabled or involved in an accident at a location distant from the company's terminal.

Because law enforcement agencies typically have authority to have vehicles towed from roadways when they are obstructing traffic, unsafe to drive or left unattended because the driver has been arrested, truck companies may have little or no say in which towing/recovery company will be used to move their equipment.

The result is that a towing service that may not have been even selected by the trucking company ends up in control of the company's equipment and cargo, holding

both as ransom for payment of what appears to be an extravagant invoice for towing and recovery services.

Here are some suggestions to control the result:

1. Try to control the selection of the towing company, the pieces of equipment that will be sent and scope of the services. If the selection of the towing company has been dictated by the policing agency, find out the towing company's name and contact information so you can contact them immediately to discuss the situation.

2. Have your personnel at the scene make notes on the number of towing personnel on the scene and types of equipment being used. Take photos if possible of the towing

equipment, as well as photos of the condition of your equipment and cargo, before the towing or recovery operations commence. Arrival and departure times for the towing personnel should be noted.

3. Request that a detailed invoice be faxed or e-mailed as soon as possible. You can use the information you obtain from your own on-site "investigation" to help determine whether the invoice is reasonable and whether all the charges were necessary.

4. The towing company always is going to take the position that it has lien on the equipment and cargo for the amount of the towing, recovery services and storage and it must be paid in full before it will release either the equipment or cargo. Depending on the jurisdiction where the towing services were performed, there likely will be a right to a lien on the equipment. There may not be a lien on the cargo, however, which means it cannot be held by the towing company. Also, the lien may only apply to the charges for the towing equipment which was actually used at the scene.

5. If an invoice dispute occurs, and it can not be resolved through negotiations, there are legal remedies. These include suing to require the equipment or cargo to be released, suing for damages related to the wrongful detention, and challenging the reasonableness of the towing company's invoice.

6. If time is of the essence, usually the local law will provide for some form of an expedited hearing for return of the property. Success usually will require posting a bond which may be a multiple of the value of the invoice. Your attorney may be able to negotiate a release of the equipment and cargo by agreeing to escrow sufficient funds to cover the amount of the invoice and then negotiate or litigate, if necessary, the reasonableness of the amount. However, before litigation commences, a business decision needs to be made as to whether the amount in dispute for towing/recovery services is worth the cost of litigating, as many times it is not.

### ROAD REPORT

specified weight or passenger thresholds.

*Vidinliev v Carey Intl (ND Ga 2008)*

■ **BE CAREFUL OF WHAT YOU ASK FOR.** The Court held that a carrier's cargo policy did not provide coverage for drugs or pharmaceuticals destroyed in a truck fire where it was determined that the application for cargo insurance, prepared by the motor carrier, identified only auto parts, produce, steel castings, vacuums and "Slim Fast" as commodities which would be transported during the policy term.

*Amerisure v Carey Trans. (WD Mich 2008)*

■ **LOG DESTRUCTION DAMAGES DEFENSE.** When a carrier unilaterally decided to hold only 8 days of driver logs after receipt of a pre-litigation demand from plaintiff's attorney to preserve all logs from the driver involved in a personal injury accident, the Court ruled that the carrier had committed spoliation of evidence prejudicing plaintiff's case, and that at trial the jury would be given an adverse inference instruction (allowing the fact finders to assume that the evidence destroyed would have either supported plaintiff's claims or undercut defendant's defenses).

*Ogin v Ahmed (MD Pa 2008)*

### ON THE DOCK

■ **REDUCING CLAIM TO POLICY LIMITS** When a carrier's insurer warned that the carrier's risk on an accident lawsuit was far more than its insurance policy limits, and recommended that the carrier make a substantial contribution to the proposed settlement, the carrier hired D&F to work directly with the plaintiff and insurer attorneys. D&F developed a strategy to resolve the litigation for a policy limits settlement with no added payment by the carrier.

*D&F Attorney: Jerry Swift*

■ **MILITARY LEAVES** D&F is currently defending a driver claim brought pursuant to Michigan's Military Leaves; Reemployment Protection Act alleging that the employer did not return the driver to a discontinued driving position upon the driver's return from active Reserve duty.

*D&F Attorney: Neill Riddell*

■ **DEFENSE AGAINST BANKRUPT SHIPPER** D&F is defending a carrier against claims by a bankrupt shipper for recovery of preferential payments and unpaid freight allowances. Defenses: Claims barred by 180-day and 18-month carrier statutes of limitation; carrier entitled to setoff for unpaid freight charges resulting from bankruptcy.

*D&F Attorney: John Bryant*

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