STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ALLIED GEAR & MACHINE COMPANY, Plaintiff(s), vs.	)	
NORTH AMERICAN VAN LINES, Principal for and/or d/b/a CORD NORTH AMERICAN MOVING AND STORAGE COMPANY, UNITED EXPOSITION SERVICES, INC., CURTIS EXPOSITION TRANSPORTATION, INC., a Division of the Curtis Companies, Defendant(s).	)	Case No. 92 L 08200

RESPONSE OF ALLIED GEAR & MACHINE COMPANY TO PARTIAL SUMMARY JUDGMENT MOTION OF CURTIS EXPOSITION TRANSPORTATION, INC.

NOW COMES the Plaintiff, ALLIED GEAR & MACHINE COMPANY (hereafter, "ALLIED GEAR"), and responds to the Partial Motion for Summary Judgment of CURTIS EXPOSITION TRANSPORTATION, INC., a Division of the Curtis Companies (hereafter, "CURTIS") as follows:

BACKGROUND AND PROCEEDINGS TO DATE

On or about November 5, 1990, Plaintiff, ALLIED GEAR, entered into a written contract with CORD NORTH AMERICAN MOVING AND STORAGE COMPANY (hereafter, "CORD") whereby CORD would transport Plaintiff's Flexomaster Printing Presses from St. Louis, Missouri to the Pack-Expo show in Chicago, Illinois. (Discovery Deposition of A. Dean Kraatz, pp. 23-25; Exhibits 4,5,6, and 7) The bills of lading also required CORD to return the presses after the show back to Plaintiff's business in St. Louis, Missouri. While CORD delivered the presses to the Chicago trade show, CORD failed to

redeliver the presses back to Plaintiff's business in St. Louis in violation of the bills of lading.

At no time, did ALLIED GEAR ever agree with UNITED EXPOSITION SERVICES, INC. (hereafter, "UNITED") or CURTIS to allow CURTIS to take possession of Plaintiff's presses for any reason whatsoever. See: Affidavits of Tom Stiern ad Janet Scull, attached.

STATEMENT OF FACTS

In either September or November, 1990, Janet Scull of ALLIED GEAR contacted A. Dean Kraatz of CORD to get a price for shipping Plaintiff's Flexomaster Presses to Chicago for the Pack-Expo trade show (Kraatz Deposition, p.12; Janet Scull's Deposition pp. 18,19). The carrier for the shipment to Chicago and returning from Chicago to St. Louis was to be CORD. (Kraatz Deposition, p.12,14, and 24; Kraatz Deposition Exhibits 4-7,19) According to Kraatz, the presses arrived in Chicago on November 6, 1990 (Kraatz Deposition. p. 16, 19,22). CORD agreed to pick up the presses at McCormick Place on November 19, 1990 (Kraatz Deposition p. 17,18,24,29; Kraatz Exhibits 6,7). However, CORD's drivers arrived at McCormick Place on Nov.19, 1990, **one and one-half hours** late to pick-up ALLIED GEAR'S presses (Kraatz Deposition, p. 97, 98). Because of CORD's failure to arrive at McCormick Place on time, ALLIED GEAR'S presses were taken off the floor by UNITED. UNITED, instead of giving the presses to CORD's drivers, prepared a Bill of Lading and Shipping Memorandum and gave the presses to CURTIS, another carrier (Kraatz Deposition, p. 37-39, 60; Deposition, Exhibit 3).

For the return trip from Chicago to St. Louis, a Bill of Lading and Shipping Memorandum were allegedly signed by Thomas J. Stiern of ALLIED GEAR (Group Exhibit A).[1] However, Thomas J. Stiern signed UNITED's Bill of Lading and Shipping Memorandum consigning the shipment to NORTH AMERICAN VAN LINES (hereafter, "NORTH AMERICAN"). (Stiern Deposition pp.33-36) Without either Thomas J. Stiern's permission or knowledge, the name "NORTH AMERICAN" was scratched off the Shipping Memorandum and CURTIS's name was filled in. (Stiern Deposition p.33; Scull Deposition p.116) Thomas J. Stiern further testified that ALLIED GEAR never had an agreement with CURTIS for them to take ALLIED GEAR's presses (Stiern Deposition, p.123) Thomas J. Stiern never gave permission to either UNITED or CURTIS which would allow CURTIS to take the load (Stiern Deposition, p. 123,126) For that matter, UNITED's Shipping Memo with CURTIS's name on it was not seen by ALLIED GEAR until after the modified Shipping Memo was delivered and the damage identified.

ARGUMENT

I.

CURTIS'S FILED TARIFFS ARE INSUFFICIENT TO PRECLUDE CURTIS'S LIABILITY FOR THE ACTUAL LOSS SUSTAINED BY ALLIED GEAR

CURTIS cites Phillips Electric Company v. Seiko Messenger Service, 235 Ill. App.3d 513 602 N.E.2d 62 (1st Dist., 1992) apparently to argue that filed tariffs control over conflict in

[1] The "Limits of Liability and Responsibility" is the backside of both the Shipping Memorandum and the Bill of Lading.

Bills of Lading (Summary Judgment Motion pp.4-5). The facts and holding of Phillips are inapplicable here. In Phillips, plaintiff Phillips negotiated directly for the delivery of a package with Seiko Messenger Service. Additionally, Seiko issued Phillips a Bill of Lading with a reverse side of Bill of Lading noting a tariff and establishing a declared value. Phillips, 602 N.E.2d at 64.

Here, UNITED issued a Straight Bill of Lading and a Shipping Memorandum which were signed by Thomas J. Stiern. The carrier was listed as NORTH AMERICAN, then changed by UNITED when NORTH AMERICAN failed to appear. While CURTIS argues these shipping documents are controlling, no reference is made either in CURTIS's motion or in the shipping documents as to who's tariff controls or why. For that matter, the transit documents were never signed by either UNITED or CURTIS. See: group Exhibit A.

Unlike the Phillips opinion, ALLIED GEAR never negotiated with CURTIS for any carriage, never received any notification of declared value, and was never given a reasonable opportunity to choose between two or more levels of liability. See: Hughes v. United Van Lines, Inc., 829 F.2d 1407, 1415 (7th Cir., 1987).[2] In that regard, CURTIS has never shown it obtained ALLIED GEAR's

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[2] As was stated in Hughes, "any limitation of liability must be brought to the attention of the shipper before the contract is signed, and the shipper must be given a choice to contract with or without the limitation of liability in the movement of his goods. Hughes v. United Van Lines, Inc., 829 F.2d 1419-1420.

agreement to ALLIED GEAR'S choice of liability coverage.[3] Certainly CURTIS could have contacted ALLIED GEAR to discuss ALLIED GEAR's transportation options rather than holding Plaintiff's presses hostage until CORD paid CURTIS's freight charges (Kraatz Deposition, pp. 53,54,60; Kraatz Exhibits Group 9-B).

ARGUMENT
II.
THE NOVEMBER 17, 1990 BILL OF LADING AND SHIPPING MEMORANDUM ARE INVALID TO LIMIT CURTIS'S LIABILITY AS THEY FAIL TO SPECIFY A RELEASED RATE

CURTIS argues CURTIS EXPOSITION TRANSPORTATION, INC.'S Tariff 400, Item 848, "Released Valuation" is sufficient to limit CURTIS'S liability to $5,000 per package ton. (Summary Judgment Motion, p.3) (See also: Curtis Exposition Transportation, Inc., Tariff 400 filed with this court on April 20, 1995) However, before concluding that the $5,000 released value limitations preclude ALLIED GEAR from seeking a greater recovery from CURTIS, the Bill of Lading, Shipping Memorandum, and Tariff's must be looked at together. For example, Tariff 400, Item 848 (concluded) Paragraph (d) states:

> **"The released value must be entered on the shipping order and bill of lading in the following form:**
>
> > **The agreed or declared value of the property is hereby specifically stated by the shipper is not exceeding per ton of 2,000 pounds."**

Clearly, this tariff provision requires CURTIS to enter the

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[3] Paragraphs 6 and 7 of CURTIS'S Summary Judgment Motion have no bearing on this proceeding. Whether ALLIED'S claim is brought pursuant to subrogation provisions of an insurance policy is as irrelevant as is the fact that St. Paul Insurance has a liability policy covering CURTIS'S activities.

released value on the Shipping Order and the Bill of Lading. Exhibits 2 and 3 of CURTIS'S Summary Judgment Motion make no reference to released rates.

As was stated in Roehmer Gehrig Co. v. Tri-State Motor Transit, 950 F.2d 1079 (5th Cir.,1992):

> "if a carrier desires to limit its liability it must file one or more tariffs that set forth terms and conditions of shipment, freight rates available, and information relevant to shipping, including limitation of liability. Central to the scheme of limitation of liability is the requirement that each rate listed in the tariffs specify a "released rate", which is the maximum dollar liability per unit of weight for which the carrier will be liable. Also central to the I.C.C.'s liability limitation scheme is the requirement that there be a written agreement between the shipper and the carrier. The B.O.L. is the form most frequently used for such agreements. If the carrier is to limit its liability, the written agreement between shipper and carrier must contain a so-called "inadvertence clause". The Inadvertence clause specifies that released rate and states that such rate will apply unless the shipper declares otherwise. Id. at 1082.

For CURTIS to limit ALLIED GEAR's recovery to amounts found in CURTIS's Tariff 400, CURTIS must show UNITED's short form Bill of Lading and Shipping Memorandum had released valuation clauses which strictly or substantially complied with CURTIS's tariff. Roehmer Id. 1084. See also: 49 U.S.C. Par. 11707(c)(4); 49 U.S.C. 10730; 49 U.S.C. 10730 (b)(1).

In other words, CURTIS is not eligible to limit its liability to its tariffs unless its Bill of Lading complies with that tariff. Careful scrutiny of CURTIS's Summary Judgment Exhibits 1 and 2 shows there is no mention whatsoever to released valuation.

Aside from the inconsistency between CURTIS'S transit documents and its Tariff 400, CURTIS has additional burdens of

proof to meet before this Court can allow Partial Summary Judgment.

Here, CURTIS must persuade this Court that: (1), it maintained a tariff in compliance with I.C.C. Requirements, (2), gave ALLIED GEAR a reasonable chance to choose between two or more liability levels, (3), obtained ALLIED GEAR's agreement as to its choice of liability, and (4), issued a Bill of Lading prior to moving the shipment that reflects the agreement. Acro Automation Systems v. Iscont Shipping, Ltd., 706 F.Supp. 413 (D.Md., 1989. Hughes v. United Van Lines, Inc., 829 F.2d 1407 (7th Cir., 1987).

In determining whether these requirements have been met, Courts consider the following factors: (1), whether the carrier has given adequate notice of limitation of liability to the shipper, (2), the economic stature and commercial sophistication of the parties, and (3), the availability of "spot" insurance to cover the shipper's exposure. Owens-Corning Fiberglass Corp. v. U.S. Air, 853 F.Supp. 656,665 (E.D.N.Y., 1994); Welliver v. Federal Express Corporation, 737 F.Supp. 205 (S.D.N.Y., 1990).

The transit documents CURTIS relies on in its Summary Judgment Motion make no reference to any released valuation limitations, contains no bold face type limiting liability, nor is there any indication that any form of limitation of liability was as a result of an open, just, and reasonable agreement between CURTIS and ALLIED GEAR. Hughes v. United Van Lines, Inc. 829 F.2d 1407, 1415 (7th Cir., 1987). There has further been no showing by CURTIS that ALLIED GEAR was given the option of higher recovery from CURTIS upon paying CURTIS a higher freight rate. Welliver v. Federal

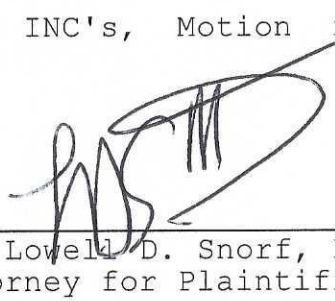
Express Corporation, 737 F.Supp. 205, 207 (S.D.N.Y., 1990). It must be certainly clear from the facts that ALLIED GEAR's only transportation agreement was with CORD.

It should also be clear that the original Bill of Lading identified CORD as the carrier, not CURTIS. A change of carriers was not contemplated by ALLIED GEAR. To believe that CURTIS'S released value tariffs were the process of open negotiations between the parties is not factually sustainable.

As CORD arrived at McCormick Place late, UNITED gave the load to CURTIS. ALLIED GEAR never agreed to allow CURTIS to take the load. (Kraatz Deposition, pp. 36,38,39,40); Stiern Deposition, pp. 123,126; Scull Deposition, pp.16,17,18,20).

Therefore, it is factually impossible to believe that ALLIED GEAR had any open negotiations with CURTIS on freight charges, liability limitations, delivery options, or tariff limitations and it would be extremely unfair to bind ALLIED GEAR to CURTIS's tariff limitations.

Wherefore, Plaintiff, ALLIED GEAR & MACHINE COMPANY, respectfully requests this Honorable Court to deny Defendant, CURTIS EXPOSITION TRANSPORTATION, INC's, Motion for Summary Judgment in its entirety.



By: Lowell D. Snorf, III
Attorney for Plaintiff

Lowell D. Snorf, III

LAW OFFICES OF LOWELL D. SNORF, III
25 East Washington Street Suite 1500
Chicago, Illinois 60602
Telephone: (312) 984-0421