1980

Insurance Company of North America v. Lanseair Travel Agency, Inc., Et Al. : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff,

vs.

LANSEAIR TRAVEL AGENCY, INC., et al.,

Defendant.

Case No. 16604

BRIEF OF APPELLANT

Appeal from Judgment of Third District
Court of Salt Lake County

Honorable James S. Sawaya, Judge

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and Respondent

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STATEMENT OF CASE

This is a bonding company subrogation case brought by the Insurance Company of North America against Lanseair Travel Agency, Inc., Preben H. Nielsen and Rulon DeYoung. The action was tried before the Court without a jury.

DISPOSITION IN LOWER COURT

At the close of all evidence the Court dismissed the action against Rulon DeYoung and entered Findings of Fact and Conclusions of Law and Judgment in favor of Plaintiff and against Lanseair Travel Agency, Inc., and Preben H. Nielsen. A Motion to alter and amend the Findings of Fact and Conclusions of Law and to enter a new judgment was denied by the Court. Preben H. Nielsen appeals from the initial

Judgment and the Order denying the motion to alter or amend the Findings of Fact and Conclusions of Law and to enter a new judgment. No appeal was taken by the corporation.

RELIEF SOUGHT ON APPEAL

Preben H. Nielsen seeks a reversal of the judgment against him and judgment against Plaintiff, no cause of action, and that failing, Appellant requests a new trial.

STATEMENT OF FACT

Lanseair Travel Agency, Inc., is a Utah corporation that maintains its principal place of business at Salt Lake City, Utah. Preben H. Nielsen was instrumental in forming the corporation in 1972 and at that time the corporate purpose was to engage in the business of travel agency principally in the State of Utah. (Tr. 5) Mr. Nielsen was a stockholder and director of the corporation and owned in excess of fifty percent (50%) of the issued stock. There were other stockholders however.

In order to engage in the travel business, it is almost essential that the agency receive an appointment from Air Traffic Conference of America. Air Traffic Conference (ATC) is an unincorporated trade association formed by all of the domestic scheduled airlines in the United States. It maintains its place of business in Washington, D.C. When a travel agent is appointed an agency by ATC, that agent will then have in its possession the ticket stock and validating stamps of the various airlines. This enables the agent to arrange travel in its office, issue the necessary airline tickets and then bill the customer for the cost. The agent customarily receives a 15% commission on the airline business that it writes. The customer is benefited because, as in the case of many companies, they can arrange employee travel on a credit basis and all of the details of travel are worked out by the agency.

One of the applications for agency status was introduced as an exhibit in the case. (Ex. 8)

As a condition to the appointment as an ATC agent it was

necessary that Lanseair furnish a bond in the amount of $10,000. Both the Application for Bond and the Indemnity portion of the bond, a part of the application packet furnished to Lanseair by ATC, and the completed bond application was returned by Lanseair to ATC and not the bonding company. (Tr. 76-77) The bonding company is the Plaintiff - Respondent herein, Insurance Company of North America (INA).

The Application for Bond and Indemnity Agreement signed by Mr. Nielsen are extremely significant in the determination of this case and a copy has been appended to this Brief. We ask the Court to be mindful that on the reverse side of Exhibit I and the last statement on the bottom of the page reads:

"APPLICATION FOR BOND GIVEN BY TRAVEL AGENCY TO AIR TRAFFIC CONFERENCE, WASHINGTON, D.C."

Mr. Nielsen did not at any time have any knowledge of any relationship between ATC and INA and no knowledge whatsoever as to the agent or broker with whom ATC conducted its INA bonding business. (Tr. 77-78)

Shortly after the formation of Lanseair Travel Agency, Rulon DeYoung became the principal employee of the business. (Tr. 109) Mr. Neilsen had full time employment as an officer of Deseret Federal Savings and Loan Association and supervised the Lanseair Travel Agency. The business was operated successfully and all remittances were timely made to ATC for air transportation sold by the agency to and including the 31st day of August, 1974.

In the summer of 1974, Mr. DeYoung had expressed an interest in acquiring the majority of the stock control of the agency. Negotiations

between Mr. Nielsen and Mr. DeYoung resulted in the execution of a stock purchase agreement and promissory note on August 23, 1974. (Ex. 12)

On that date (August 23, 1974) Mr. Nielsen wrote a letter to Air Traffic Conference, a copy of the letter (Exhibit 46) is reproduced at this point in the brief because of significance.

"August 23, 1974

Mr. John S. Rice
Air Traffic Conference of America
1000 Connecticut Ave. N.W.
Washington, D.C. 20036

RE: Lanseair Travel Agency, Inc.
1836 West North Temple St.
Salt Lake City, Utah 84116

Dear Mr. Rice:

Referring to Agency Rules, Resolution 810a, Section B, Paragraph (9), you are hereby notified that as of August 23, 1974 the controlling interest of Lanseair Travel Agency, Inc. was transferred from P. H. Nielsen and S. L. Hardy to Rulon DeYoung, 1015 East 3825 South, Salt Lake City, Utah.

Mr. DeYoung, who has managed Lanseair Travel Agency, Inc. since its beginning, has today purchased the stock held by P.H. Nielsen and E.L. Hardy (43,500 shares) and thus gained the controlling interest of said Agency. Mr. DeYoung has today assumed the position of President of Lanseair Travel Agency, Inc. and P.H. Nielsen and E. L. Hardy have resigned from their positions with Lanseair Travel Agency, Inc. leaving Mr. DeYoung free to name his new officers and members of the Board of Directors.

Please change your records accordingly, and also be notified that P. H. Nielsen and E. L. Hardy will assume no personal liability or responsibility in connection with the future business transactions of Lanseair Travel Agency, Inc., this also applies to any possible personal liability or guaranty with the ATC bond. Please notify your bonding company of this change.

Very truly yours,

P.H. Nielsen

P.H. Nielsen
2899 Branch Dr.
Salt Lake City, Utah 84117"

The reason Mr. Nielsen wrote directly to ATC in connection with the sale of the business and termination of his responsibility on the bond is that was the only address he had ever been given. This ties directly with Plaintiff's Exhibit 1, relative to the office to whom the bond application should be delivered.

After August 23, 1974, Mr. DeYoung assumed full and complete control of the business affairs of Lanseair Travel Agency.

It will be significant to note at this point that the ATC required the travel agency to remit the amount received for airline tickets less commissions on the tenth, twentieth and end of each month.

The remittance to ATC by Lanseair was made and the check honored for the 30th of August, 1974. (One week to the day after Appellant sold the business and forwarded Exhibit 46 to ATC.) Thereafter, for the remittance period of September 10, 1974 the Lanseair check dated September 13, 1974 in the amount of $3,742.83 was returned "refer to maker". (Exhibit 10) Later, a check in the amount of $6,201.64 from Lanseair Travel Agency, Inc., to ATC on the 25th day of September, 1974 was returned marked "refer to maker". (Exhibit 11)

The reason that these checks were returned to the maker is not clear from the evidence. By the end of September, 1974, Mr. DeYoung had ceased the business activities of Lanseair. The bank account

of Lanseair Travel showed a balance at the end of August of $14,685.17. There were deposits to the account of approximately $10,000. There was testimony also tha approximately $35,000 was deposited in the account in September. At best the record on the balance of the account is confusing and the reason why the two checks to ATC (Exhibits 10 and 11) were not honored by the bank is far from clear. (Tr. 126 - 137, 234 - 245) At all events, the first indication that Lanseair Travel Agency, Inc. would not be able to continue in business was a letter from Plaintiff INA to ATC dated September 10, 1974. (Exhibit 20) This letter indicates that the bond was cancelled that date and that the cancellation would be effective October 10, 1974. Evidently a copy of this exhibit was mailed to Lanseair as well as ATC. The action of INA preceded the delivery and dishonor of the check dated September 13, 1974. (Exhibit 10) This check appears to have been processed by the First Security Bank in Salt Lake City on September 18, 1974 and returned as of that date. There is no reason for the bonding company to have cancelled the bond as of that date unless it had received word from ATC of a change in agency status and the revocation of Mr. Nielsen's indemnity agreement. Significantly, not one employee or other representative of INA appeared at the trial to explain this action and not one representative of INA even attended the trial. There was no evidence whatever produced by the Plaintiff to show why the bond was cancelled.

ARGUMENT

POINT I: THE INDEMNITY AGREEMENT SIGNED BY PREBEN H. NIELSEN WAS REVOKED BEFORE THE DATE OF THE ALLEGED LOSS AND THE LOWER COURT ERRED IN NOT SO FINDING.

This point of argument and the following Point of Argument are closely related and both require consideration of testimony and exhibits relating to the Application for Bond (Exhibit 1), Bond Verification (Exhibits 16 through 19), the Bond (Exhibit 15), and the letter of termination (Exhibit 46), letter to ATC (Exhibit 41) and Bond Revocation (Exhibit 20).

The majority of the testimony relating to the case of INA came from Ms. Darlene Dolan, an employee of ATC in Washington, D.C. As noted above, no one from INA appeared at the trial or testified in the action. Ms. Dolan testified that she was a supervisor in the area of agency default but was not knowledgeable on questions concerning the bond, bond application and other correspondence appearing in the Lanseair file. (Tr. 184)

Through Ms. Dolan, the Court permitted the introduction of Exhibit 15, the "Bond", over objection. (Tr. 153) The Court will at once note that the bond does not have appended to it a schedule of travel agents. The bond states as follows:

> "KNOW ALL MEN BY THESE PRESENTS that Insurance Company of North America, a corporation of the commonwealth of Pennsylvania with the home office in the City of Philadelphia (herein called "Surety") is hereby held and firmly bound unto Air Traffic Conference of America

(herein called "Obligee"), as agent for and on behalf of any airline member of Obligee contracting with Travel Agent(s) (as named in the attached schedule or as it may be supplemented from time to time by adding, deleting or changing names of Travel Agents therein)."

No one will ever know, if in fact, Lanseair Travel Agency was ever included on the schedule appended to the bond. Why it is missing is unknown. However, since no one from INA appeared at the trial to explain this deletion or to supply a copy of the schedule we must assume that no such schedule exists. It bears a receipt date of August 10, 197(?) although it is dated the 31st day of August, 1966 and it bears no identifying number. Note on Exhibit 17, as an example, that a so called schedule bond number 479771 is set forth but we have no way of knowing whether those premium period receipts relate to the bond relied upon by INA. Furthermore, the evidence was conclusive that Mr. Nielsen had never been furnished a copy of the bond.

The importance of this exhibit cannot be underestimated. If someone is to be charged with agreement of indemnity it is only fair that the underlying agreement (in this case the bond), to which this indemnity agreement allegedly attaches, be identified and the adverse party given a opportunity to cross examine. It should not have been admitted.

The Court is now referred to the Indemnity Agreement (Exhibit 1). It is important to know that it does not contain any period of duration nor does it specify the manner in which it may be terminated by either party. It does contain the following statements which are significant:

"Undersigned agrees that surety may decline to undertake obligation applied for or may cancel or terminate the same,

and will return any unearned premium due on demand, all free of any claim for loss of damage by undersigned."

...

"The Undersigned further agrees to reimburse surety for all expenses incurred in forcing the provision of this policy, and agrees to pay premiums annually in advance at a rate to be agreed upon."

As shown by the evidence, the agency operated successfully through August 31, 1974. On the 23rd day of August, 1974, negotiations between Mr. Nielsen and the agency manager, Mr. DeYoung culminated in an agreement of sale. (Exhibit 12) The agreement is signed by Mr. DeYoung as President of the corporation and Mr. Nielsen and Mr. Hardy as stockholders.

On that day, Mr. Nielsen directed his letter (Exhibit 4 and 46) to ATC stating that the agency had been sold and requesting that they advise their bonding company that he would no longer be responsible on the bond.

Ms. Dolan testified that the letter, from Mr. Nielsen, was not in the Lanseair file. She did not testify that it was not received by ATC and admitted that had it been received by ATC it would have been directed to someone other than herself. She did not know who that would have been at the time. (Tr. 189) Although she was not the person who would have carried out the instruction to notify the bonding company, she did testify that ATC would simply have ignored that request. (Tr. 190) Of course, that does not prove that the person that received the letter did not carry out the instructions it contained.

The additional fact that clearly shows that the bonding company must have had knowledge of the termination of the indemnity agreement

is that before there was any question about the status of the Lanseair account, the bonding company gave the notice to ATC that it was terminating the bond. (Exhibit 20 dated September 10, 1974) No one from INA testified concerning the reason bond was terminated at a time when the affairs of Lanseair Travel were in perfect order. It must be concluded that they had in fact received notice of the cancellation of the indemnity agreement from Mr. Nielsen.

Where an indemnity agreement is silent as to its duration, it may be cancelled by either party at will on notice.

> "A contract of indemnity continues in force only during such time as is expressly or impliedly provided for in the contract, and at no time is fixed for its duration, it is a contract terminable at the will of either party. " 41 Am Jur 2nd, Indemnity, Section 8.

The above principal is supported in the case of American Surety Company vs. Blake, 54 Idaho 1, 27 P2d 972.

The lower Court in substance found that Mr. Nielsen did not prove that the letter of August 23, 1974 was ever delivered to ATC or that INA had any notice or knowledge thereof and that ATC was not the agent of INA so that notice given to them would be binding on the bonding company.

Those findings which are paraphrased above are contrary to the manifest weight of the evidence. It was shown that either ATC or INA directed that the indemnity agreement be delivered to ATC and that was the only entity with which Mr. Nielsen had any dealings concerning the bond. The letter was mailed by Mr. Nielsen and never returned to him. A later letter, by Mr. Nielsen (Exhibit 41), was delivered to ATC and was in their file at the time of trial. This letter was mailed to the identical address that Mr. Nielsen mailed the letter of August 23, 1974.

This, coupled with the fact that the bonding company terminated, for no apparent reason, leads to the inescapable conclusion that ATC had notice and that the bonding company also had notice.

The bond in this case, admitted over objection, it unique. The procedure of adding or deleting entities from a schedule from time to time is not the usual methoe utilized by an insurance company to bond an insurer. Usually, an individual bond is written on each undertaking assumed by an insurance company. There are direct dealings between insurance company, the party bonded, and the party in favor of whom the bond is written. In this case, most of these lines of communication are absent. Legal interpretation of this type of bond is virtually nil except for the Hoyt case.

The point urged by Mr. Nielsen is that inasmuch as INA had no communication with either Lanseir or Mr. Nielsen concerning the bond and indemnity agreement, INA cannot be heard to complain that notice to ATC of indemnity termination was not given to the property party. On the printed indemnity agreement appended to this brief it states:

> "APPLICATION FOR BOND GIVEN BY TRAVEL AGENT TO AIR TRAFFIC CONFERENCE, WASHINGTON D.C."

Contrary to the findings of the Court, ATC was obviously the agent to INA to receive communications from indemnitors. Mr. Nielsen never had any communication from the bonding company prior to the alleged loss and no knowledge of the offite of INA in which to direct communications and would naturally deal with the same party to whom he had sent the initial application. INA is estopped from denying that ATC is an agent for the purpose of receiving notices under the bond.

POINT II: BOND COVERAGE AND THE INDEMNITY AGREEMENT TERMINATED FOR NON-PAYMENT OF PREMIUM ON SEPTEMBER 1, 1974 PRIOR TO THE ALLEGED LOSS.

The attention of the Court is invited to Exhibits 17, 18, and 19 which are similar and are entitled Memorandum of Bond Verification. The significance of each of these documents is that the premium period in specified in each exhibit. Exhibit 17 shows the premium period from 8/3/72 to 9/1/72. Exhibit 18 shows the premium period to be 9/1/72 to 9/1/73. Exhibit 19 shows the premium period to be from 9/1/73 to 9/1/74. There was never any premium paid by Lanseair Travel or anyone else for any coverage beyond September 1, 1974.

To the date of September 1, 1974, the agency account of Lanseair Travel Agency was in perfect order and the ATC was paid for all airline tickets sold to that date. This was specifically testified to by Mr. DeYoung. (Tr. 126) INA does not contend otherwise. The claim of INA is for airline tickets sold subsequent to September 1, 1974.

Although elementary, it is well remembered that:

> " A contract of insurance must be assented to by both parties either in person or by their agent. There must be a meeting of the minds of the parties on the essential terms and elements of the contract. These essential terms include, in general, the following: (1) the subject matter to be insured; (2) the risk insured against; (3) the commencement and period of the risk undertaken by the insurer; (4) the amount of insurance; and (5) the premium and time in which it is to be paid."

42 Am Jur 2nd, Insurance, Section 203.

In this case the commencement was September 1, 1973 and the period was to September 1, 1974. (Exhibit 19) The premium was to be paid annually in advance. (Ex. 1)

The conclusion to be drawn is that when the premium period expired on 9/1/74 the indemnity agreement terminated on that date because there was no insurance contract to which indemnity could attach.

The case that supports this conclusion in all particulars is that of Insurance Company of North America -vs- Hoyt, 419 F2d 1148 (1969). In this case INA brought suit against an indemnitor on a bond issued to Air Traffic Conference where a travel agent had been included on the schedule bond.

The language of the indemnity agreement appears to be identical with that of Exhibit 1 in this case. The individual indemnity agreement signed by Mr. Nielsen is identical.

In the Hoyt case, the agent applied for inclusion on the bond in 1963. The application was granted subject to Hoyt executing the indemnity agreement. Likewise, in 1964, the agent was included in the schedule and again Hoyt signed an indemnity agreement. In 1965 the agency was included but no new indemnity agreement was sent. A premium notice was, however, furnished to the agency which was paid and the agency included on the bond for the calendar year of 1965. In June, the agency defaulted in the amount of $71,000 that it owed to ATC.

The lower court ruled that since a new indemnity agreement had not been forwarded for the year 1965 that the company was satisfied that there was no need for such personal guarantee. The appellate court

ruled, however, that the indemnity agreement was a continuing one and was in effect during 1965 when the default occurred. The Court also ruled that Hoyt's attempt to cancel his indemnity agreement prior to the loss was ineffectual.

In the Hoyt case the loss occurred during the period for which a premium was paid. The Court then made the following observation on this subject which has particular application to our case.

> "The indemnity obligation had no definite term of duration. The agreements ran from year to year upon approved application, or, after 1964, upon payment of premium. Corydon paid the premium for the bond coverage for the full year of 1965, and thus the agreements were in effect during that year. The facts here do not justify applying the rule from Mamerow -vs- National Lead Co., 206 Ill. 626, 69 N.E. 504 (1903), that a continuing guarantee, not limited as to duration and amount, will be construed to be limited to a reasonable time. The evidence here is plain that the indemnity was continuous, but its duration was terminated by the failure to pay in advance annually the premium required." (Emphasis added)

The distinction between this case and the Hoyt case is that the loss in the Hoyt case occurred at a time when a premium had been paid for coverage. In our case, the loss occurred at a time subsequent to the date of premium coverage. As in the Hoyt case, this Court should rule that when the agent did not pay a premium for coverage beyond September 1, 1974 that the indemnity agreement was thereby terminated. That ruling is consistent with the only other published case on this subject.

The lower Court ruled that coverage was effective through October 10, 1974. This ruling was based upon the fact that INA sent

or delivered a letter dated September 10, 1974 indicating that coverage would terminate as of October 10, 1974. That ruling of the Court is totally devoid of any legal or evidentiary basis.

The Court evidently based its ruling on the position taken by INA that the bond contained a thirty day cancellation clause, (Exhibit 15) and a notice dated September 10, 1974 by INA stating that coverage would terminate on October 10, 1974. The Court committed a number of errors in accepting the position advanced by INA.

As indicated above, Exhibit 15, the bond, should not have been admitted into evidence because its admission lacked a proper foundation. There was no schedule attached and it does not appear to bear any relationship to the bond number set forth on the premium period documents.

The bond and the indemnity agreement are not consistent. The indemnity agreement provides that premium must be paid annually in advance. The bond contains no provision relative to premium.

Neither Lanseair Travel Agency nor Mr. Nielsen were ever furnished a copy of the bond and the bond is not in any manner made a part of the indemnity agreement and none of the terms of the bond are incorporated in the indemnity agreement.

The bond provides for a thirty day cancellation time. The indemnity agreement contains no such term and in fact states that the bonding company may decline to undertake the obligation and may cancel and terminate the same at its discretion - not after giving thirty days notice.

More particularly, the Court misconstrued paragraph 5 of the

bond relative to a thirty day cancellation notice. This paragraph of Exhibit 15 reads:

> "If surety shall so elect, liability assumed with respect to any named Travel Agency may be cancelled by giving 30 days written notice, sent by regular mail, to the last known address of Obligee and Travel Agent(s). The surety, however, will remain liable for any default occuring during the period up to the expiration of said 30 days notice." (Emphasis added)

The key to that paragraph is the underlined words "liability assumed". INA assumed liability only for an agent who had paid a premium and only then during the period of time covered by the payment of premium. In this case, it ran from September 1, 1973 to September 1, 1974. (CF. The Hoyt case where the premium was on a calendar year basis.) After the termination of the premium period, on September 1, 1974, the above quoted paragraph of the bond had no application. It applied only during the premium period. As an example, if the bonding company elected to terminate coverage on June 1, 1974, it would be necessary that they give notice and coverage would terminate on July 1, 1974.

We do not know why INA took the course it did, since no one from that company chose to come to Court an explain these procedures. It certainly may be inferred, however, that where INA insures a thousand or more travel agencies it enjoys a very special financial arrangement with ATC and would likely want to protect that association. That, of course, is their business and their decision. However, they cannot unilaterally attempt to extend bond coverage, pay an alleged claim, and drag the indemnitor along with them.

The indemnity agreement must be construed strictly against the bonding company under elementary principals of contract. Its wording and all inferences drawn therefrom must be construed in favor of the indemnitor and against the indemnitee.

The other point that the lower Court ignored is this: if the bonding company could select the date on which coverage would terminate, at what period in time does that right expire? The bonding company choose September 10 as the day on which to give notice. Why that date is selected is a mystery insofar as this record is concerned except for the fact that it may be logically inferred that prior to that date they had received notice that Mr. Nielsen had revoked his indemnity agreement. However, let us assume that INA chose November 1 as the date in which they would give notice. Would that be appropriate under the terms of the bond, the indemnity agreement and the bond verification documents? Suppose the bonding company had selected the date of January 15, 1975. If INA could select September 10 as the date of cancellation notice, then logically it could select any other date on into the future ad infinitim. This is the effect of the finding of the lower Court and bears absolutely no support in the field of bonding law and indemnity agreements.

There must be a time when an indemnity agreement terminates. That time in this case is at the end of the premium period. There is no other construction to be placed upon these instruments. The bonding company may choose to extend coverage to its obligee as a matter of courtesy or for whatever reason, but it cannot bind an indemnitor to that unilateral action.

POINT III: THE COURT ERRED IN ADMITTING IN EVIDENCE AS BUSINESS RECORDS THE RECORDS OF THIRD PARTIES.

As indicated in this Brief, the only person who testified concerning loss was Ms. Darlene Dolan, an employee of ATC. The loss, if any occurred, came about by reason of the failure of Lanseair to remit to ATC funds received for the sale of air transportation with the various airlines. She had no independent knowledge whatever of either the amount or the extent of the loss with the exception, possibly, of the two checks issued by Lanseair in September that were not honored by the payee bank.

The approach taken by INA in proof of claim related to Exhibit 37, which is documentation prepared by Western Airlines, United Airlines, Hughes Airwest, Frontier Airline and Continental Airlines; Exhibit 28 a proof of loss prepared by Ms. Dolan; and Exhibit 36 a document prepared by one John L. Haymaker, Jr., who did not appear in Court. All of these exhibits were admitted into evidence over the objection of Defendant. None of the documents were prepared by personnel of ATC under the supervision of Ms. Dolan. None of the third parties who did prepare the documents appeared to testify, and of course, were not subject to any right of cross-examination by counsel for Defendant to determine whether in fact these instruments were trustworthy.

In an interchange between counsel and the Court on the admission of these documents the Court erroneously set the legal basis for introduction in the following manner:

> "MR. GARRETT: Well, it contains heresay evidence again. Hearsay testimony.

MR. DART: It's a business record received by the company, Your Honor.

THE COURT: I'll let it in. Might as well let it all come in, huh?

(Plaintiff's Exhibit Numbers 27 and 36 received in evidence.)

MR. GARRETT: I noticed.

THE COURT: Well, you know, that's the modern trend, let everything in." (Tr. 182)

Contrary to the position the Court took in regard to the admission of the hearsay evidence, the correct rule is set forth in 30 Am Jur 2nd, Evidence, Section 9 51:

> "A book of accounts is to be regarded as a book of original entries notwithstanding, entries therein are copies from sales and other memoranda slips, tags, etc., if the entries were made in the usual course of business within a reasonably short time after the transactions themselves, and is admissible if supported by the testimony of others upon whose information the entries were made, to the effect that the statements are true, in addition to the testimony of the bookkeeper to the effect that he correctly entered the matter as stated by him. If the entrant made the entries upon reports of another who had personal knowledge of the transactions reported by him, then the entrant ought to be produced and required to testify that he made the entries correctly in conformity with the reports; and his testimony should be supplemented by the testimony of the one who made the reports, so that their combined testimony will be equivalent to the testimony of an entrant having personal knowledge."

The rules of evidence have not been relaxed to the point indicated by the lower Court. The test of trustworthiness of evidence inevitably arises from a proper foundation and the test of cross examination. Neither of these fundamental legal principals had application under the Court's ruling.

POINT IV: THE COURT ERRED IN REFUSING TO ADMIT DOCUMENTS IN EVIDENCE THAT PROVED AN OFFSET IN FAVOR OF LANSEAIR TRAVEL IN THE AMOUNT OF $7,572.87.

Rulon DeYoung who purchased the majority stock on August 23, 1974 and was in full control of the business of Lanseair Travel from that point to when it ceased business in the later part of September, 1974, testified extensively relating to a credit due Lanseair against any sums or amounts owing to ATC. The documents comprising this credit were labled as a group Exhibit 45. Mr. DeYoung was asked to explain to the Court the exhibit and the meaning and effect of those documents. Each of the documents comprising Exhibit 45 represented either an unused ticket or a ticket that was paid for by the customer by credit card. Where the customer paid by credit card, ATC collected that money and not the agency. Where the ticket was paid for by cash or other credit, Lanseair remitted the amount of the ticket sale three times per month. The exhibit consisted of unused tickets that had been paid for by Lanseair or tickets that had been paid for by the use of a credit card. In both cases, according to Mr. DeYoung, these tickets represented monies to which Lanseair was entitled and for which credit should have been given against any claim of ATC. (Tr. 248-253)

The Court refused to allow this exhibit into evidence. The Court did, however, permit a proffer for the record. (Tr. 255) At that time counsel indicated that the claim was in the exact amount of $7,572.87. This by way of proffer, for the record, after the Court had refused to consider the evidence of offset. (Tr. 255)

The Court did not think that the offset was a relevant claim against INA and so indicated in the record (Tr. 253)

Each of the credits would have been reflected in the report of September 20 through September 30, 1974 to ATC, but no report was made. (Tr. 252-253)

The matter of credit was called to the attention of the man from Frontier Airlines that came to the office of Lanseair in September of 1974 to pick up the stamps and ticket stock. Mr. Jeff Lyman advised Mr. DeYoung that he would be advised in the matter of credit.

To say the least, the Court's refusal to admit evidence of the credit was a complete philosophical reversal of form. In the matter of the admission of the hearsay evidence submitted by ATC relative to the amount of the claim everything was admitted. In the matter of the evidence of offset against that claim nothing was admitted. This, although the modern trend, appears to be to let everything in. In denying evidence of the offset, the Court misconceived the law on the subject of indemnity and subrogation.

A defense good against the obligee on a bond is good against the bonding company obligor in a later suit against an indemnitor. An example of this principal is contained in the case of Producing Properties, Inc., -vs- Sohio Petroleum Co., 428 S.W.2d 365 (Texas).

> "We think the rule applicable here is that when an indemnitee (INA) pays a third (ATC) party's money claim against an indemnitor to which claim the indemnitor had a good defense, the indemnitee is not entitled to recover against the indemnitor. Price v. Steves, 175 S.W.2d 450 (Tex.Civ.App., San Antonio 1943, writ re'f w. o. m.). See also 42 C.J.S. Indemnity Section 12, page 580 and cases there cited. Had the Unit Operator sued PPI in March, 1967 or later on an obligation incurred January 1, 1962 PPI's defense of limitations would have been good. Had the operator sued Sohio on the alleged obligation Sohio also could have interposed the defense of limitations.

> To hold otherwise would mean than an indemnitee by the payment of an indemnitor's debt which is barred by limitations can deprive an indemnitor of its legal defense against the alleged indebtedness. Under such circumstances the payment by the indemnitee will be a voluntary payment for which it is not entitled to a judgment against the indemnitor under its indemnity contract."

See also 41 Am Jur 2d, Indemnity, Section 36, 35 and the Restatement, Restitution Section 80.

As indicated by the evidence, the credit to which Lanseair was entitled was mentioned to the agent of ATC when he visited the agency in September 1974 and picked up the stamps and ticket stock at the time Lanseair ceased business.

The evidence shows that the bonding company paid this loss on only one document and that is the proof of loss submitted by ATC. (Exhibit 28) Two communications, Exhibit 23 and 24, preceded the proof of loss and appear to be form letters to INA or its agent alerting them to a potential loss.

There is no evidence whatsoever that the insurance company investigated the claimed loss in any particular whatsoever. There is no evidence that a claims representative called upon Lanseair to determine the status of the account or to get whatever facts Lanseair had that would bear on the amount of the loss and no evidence that the data submitted by the airlines was accurate or factual. The only evidence of loss are the two checks (Exhibits 10 and 11) issued to ATC which were returned to maker. These total $10,144.37. The offset is $7,572.87. The difference is $2,571.50.

The indemnity agreement speaks of payments made in good

faith by the surety. Payment on a proof of loss without any investigation does not meet that requirement. INA could, of course, pay any amount due ATC on any evidentiary basis that it thought proper. But, if it later charges an indemnitor it must show that the payment was made in good faith. It would certainly seem that the good faith requirement of the contract would at least put the burden upon INA to show that it investigated the claim in a reasonable manner. This it did not do and produced no evidence to that effect.

CONCLUSION

The lower Court seemed to adopt the attitude in this case that INA had issued a bond and required an indemnity agreement before issuance. INA paid a loss to ATC and was therefore entitled to reimbursement from the indemnitor in the amount of $10,000; attorneys fees of $3,000; costs incurred in the prosecution of the matter of $811.85; interest in the amount of $24.75; total $16,286.85.

Not one person representing INA attended the trial or testified. The only evidence came from one employee of ATC.

The evidence was clear:

1. The the premium period expired September 1, 1974, prior to the alleged loss. The indemnity agreement also expired that date. This conclusion is fully supported and announced by the only other reported case on this subject, which incidentally involves the same insurance company and the same type of bond and indemnity agreement.

2. Mr. Nielsen effectively and legally terminated his indemnity agreement by letter written August 23, 1974.

Appellant Nielsen is entitled to prevail on either of the foregoing principles and the Court should reverse the judgment of the lower Court and dismiss the action.

If the Court does not reverse and dismiss the action then a new trial is indicated upon the following grounds:

1. The error committed by the Court in the admission of

evidence without proper foundation.

2. The failure of the Court to allow the $7,572.87 offset.

RESPECTFULLY SUBMITTED this 18th day of January, 1980.

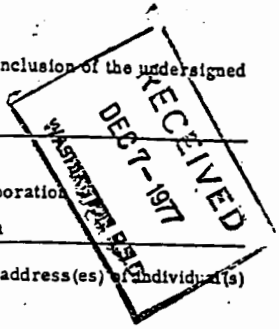
GARRETT & STURDY

Edward M. Garrett

Edward M. Garrett

INSURANCE COMPANY OF NORTH AMERICA

A.T.C. Schedule Bond Application



Application is hereby made to Insurance Company of North America for inclusion of the undersigned pplicant in a Schedule Bond in favor of the Air Traffic Conference of America.

1. Name of Travel Agency Lanseair Travel Agency, Inc.
(please print or type)

☐ Individual ☐ Partnership ☒ Corporation

2. Business Address 1836 West North Temple, Salt Lake City, Utah

3. If individual proprietorship or partnership, give name(s) and residence address(es) of individual(s) composing same (please type or print):

Name N/A Address

Name Address

Name Address

4. If corporation, give names of Executive Officers, or if closely held, give name(s) of Principal Stockholder(s) (Please type or print):

President P.H. Nielsen Director E.L. Hardy

Secretary Director W.M. Durham

Principal Stockholder

5. How long have you been engaged in the Travel Agency Business? new 6. How many employees do you have? 2 7. Do you bond your employees? yes 8. Do you carry burglary and robbery insurance? yes

9. (a) Have you ever defaulted on a contract? no (b) Have you ever been bankrupt or insolvent? no (c) Are there any judgments, suits or claims pending against you? no (d) Have you or any of your employees ever been cancelled from the ATC Agency List? no If your answer is "Yes" to any part of Question 9, give full particulars on an attached statement.

10. (a) State total of your sales of tickets for air transportation wholly within the Continental United States during the last 12 calendar months immediately prior to the date of this application . . . . . $ N/A

(b) State total of accounts receivable on such tickets for air transportation as of last Financial Statement . . . . . $ .00

(c) State the amount of total domestic air transportation sales (excluding your commissions) for each of the 3 highest months of the last 12 referred to in (a) above:

Month $ N/A

Month $

Month $

(d) State the average of the above 3 highest months . . . . . $ N/A

11. Do you understand that these moneys are the property of the Carrier and are to be held by you only until satisfactorily accounted for and remitted to the Carrier?

12. Name and Address of Bank(s) where moneys subject to this bond are deposited

First Security Bank of Utah, Salt Lake City, Utah

13. Amount of bond required (See Instructions) $ 10,000.00 14. Effective Date Change present bond from Barnes World Travel Agency

15. Do you have your books periodically audited by a Public Accountant or C.P.A.? yes If so, how frequently? yearly Give name and address of Accountant and date of last audit: N/A

16. FINANCIAL INFORMATION: Attach your most recent complete Financial Statement as prepared by your Accountant

(over)

Exhibit "A"

INDEMNITY AGREEMENT

The undersigned hereby affirm(s) that the statements contained in the foregoing application are and are made without reservation and that they are made to induce Insurance Company of North America hereinafter called Surety, to include the undersigned in a Schedule Bond issued in favor of the Air Traffic Conference of America, including any continuation thereof or any successory obligation. Undersigned agree that Surety may decline to undertake obligation applied for or may cancel or terminate same, and will pay any unearned premium due, on demand, all free of any claim for loss or damage by undersigned. In consideration of the inclusion of the undersigned in the Schedule Bond as aforesaid, the undersigned agree to perform all the conditions of all agreements entered into with Air Traffic Conference of America, in capacity as agent for the several air carriers which are parties to the Air Traffic Conference Resolution, and will fully indemnify and save Surety harmless from and against any and all loss, charges, suits, damages, counsel fees and expenses of whatever kind or nature which the Surety shall pay or incur or be put to, by reason or in consequence of the Surety having included the undersigned aforesaid Schedule Bond, or any continuation thereof or any successory obligation in the same or a different amount; further agreeing that Surety shall have the exclusive right to adjust, settle, or compromise claim under this obligation, and any voucher or other evidence of any loss, costs and expenses paid in good faith by the Surety shall be prima facie evidence of the fact and extent of the liability of the undersigned as well as of the respective heirs, executors, administrators, successors and assigns of the undersigned. The undersigned expressly waive(s) the benefit of any exemption to which the undersigned may be entitled under law. The undersigned further agrees to reimburse Surety for all expenses incurred in enforcing the provisions of this Agreement, and agrees to pay premiums annually in advance at a rate to be agreed upon.

Dated at Salt Lake City, Utah this 29th day of July, 19

_____ Witness _____ Title _____

Signature of Applicant
(If individual or partnership)

IF CORPORATION Sign Here:

Attest:

Lanseait Travel Agency, Inc.
(Name of Corporation)

_____ By _____
Secretary. Pres.

AGREEMENT

To be executed by the Executive Officers of said Corporation in their individual capacities, or by Indemnitors.

In consideration of the Insurance Company of North America executing the obligation herein applied for and warranting sufficient interest in applicant's affairs and intending to be bound by applicant's obligations, the undersigned jointly and severally hereby agree(s) to indemnify the Surety and join(s) in the foregoing Indemnity Agreement.

Witness Signature

Lorraine B. Jackson _____ Title

_____ Title

_____ Title

APPLICATION FOR BOND GIVEN BY TRAVEL AGENT
TO AIR TRAFFIC CONFERENCE, WASHINGTON, D. C.

I hereby certify that a true and correct copy of the foregoing Appellants Brief was mailed to: B. L. Dart, Attorney at Law, 430 Ten Building, Salt Lake Lake City, Utah and Richard N. Cannon, Attorney at Law, 466 East Fifth South, Salt Lake City, Utah this 21st day of January, 1980.

Karen Dewbell