1980

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

---oooOooo---

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff-Respondent,

v.

LANSEAIR TRAVEL AGENCY, INC., PREBEN H. NIELSEN, et al,

Defendants-Appellants.

Case No. 16604

---oooOooo---

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable James S. Sawaya, Judge

John D. Parken
DART & STEGALL
430 Ten Broadway Building
Salt Lake City, Utah 84101

Attorney for Plaintiff-
Respondent

Edward M. Garrett
144 South 500 East
Salt Lake City, Utah 84102

Attorney for Defendants-
Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

---oooOooo---

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff-Respondent,

v.

LANSEAIR TRAVEL AGENCY, INC., PREBEN H. NIELSEN, et al,

Defendants-Appellants.

Case No. 16604

---oooOooo---

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable James S. Sawaya, Judge

John D. Parken
DART & STEGALL
430 Ten Broadway Building
Salt Lake City, Utah 84101

Attorney for Plaintiff-
Respondent

Edward M. Garrett
144 South 500 East
Salt Lake City, Utah 84102

Attorney for Defendants-
Appellants

TABLE OF CONTENTS

	Page
NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	5
POINT I	
APPELLANT HAS FAILED TO DEMONSTRATE ANY REVERSIBLE ERROR.	
A. Upon introduction of the indemnity agreement and the canceled check by which payment under the bond was made, plaintiff INA established a prima facie case.	6
B. The trial court's findings of fact are presumed valid and will not be disturbed if based upon any substantial evidence.	12
C. Defendant Nielsen has utterly failed to demonstrate that his personal indemnity agreement was revoked prior to Lanseair's default.	14

Page

(1) The alleged letter was never received. 15

(2) The ATC was not INA's agent. . . 17

(3) The attempted revocation was not timely. 20

(4) The alleged letter was not sufficient. 22

D. Lanseair's default occurred while the ATC was entitled to protection under the bond. 25

E. The trial court's evidentiary rulings are correct, but any technical errors are harmless in any event. 29

(1) The Schedule Bond. 29

(2) The documents received by the ATC. 30

(3) The alleged credits. 33

POINT II

THE ATTORNEYS FEES AWARDED TO INA SHOULD BE INCREASED 36

CONCLUSION 39

CASES CITED

	Page
American Surety Company v. Blake, 261 Pac. 239 (Idaho 1927)	21
American Surety Company of New York v. Blake, 27 P.2d 972 (Idaho 1933)	22
Beckstrom v. Beckstrom, 578 P.2d 520 (Utah 1978)	39
Bramel v. Utah State Road Commission, 24 Utah 2d 50, 465 P.2d 534 (1970)	13
Campbell v. Gowans, 35 Utah 268, 100 Pac. 397 (1909)	16-17
Cannon v. Wright, 531 P.2d 1290 (Utah 1975)	14
Carroll v. National Surety Company, 24 F.2d 268 (D.C. Cir. 1928)	11
Dockstader v. Walker, 29 Utah 2d 370, 510 P.2d 526 (1973)	13
Fidelity and Casualty Company of New York v. Harrison, 274 S.W. 1002 (1925)	9-11
Hartford Accident and Indemnity Company v. Clegg, 103 Utah 414, 135 P.2d 919 (1943)	7
Hartford Accident and Indemnity Company v. Maus, 514 P.2d 61 (Oregon 1973)	38-39
Insurance Company of North America v. Brehm, 487 P.2d 387 (Oregon 1970)	19-20
Insurance Company of North America v. Hoyt, 419 F.2d 1148 (7th Cir. 1969)	24-25, 27-28

Page

Lander v. Phoenix Indemnity Company,
329 S.W.3d 951 (Texas 1959) 11

Nance v. City of Provo,
29 Utah 2d 340, 509 P.2d 365 (1973) 13

Pettingill v. Perkins,
2 Utah 2d 266, 272 P.2d 185 (1954) 30

Porcupine Reservoir Company v. Lloyd W.
Keller Corporation, 15 Utah 2d 318,
392 P.2d 620 (1964) 30

R. C. Tolman Construction Company, Inc.,
v. Myton Water Association, 563 P.2d
780 (Utah 1977) 12-13

Standard Accident Insurance Company v. Fell,
2 So.2d 519 (La. 1941) 8-9

State v. Kelbach,
23 Utah 2d 231, 461 P.2d 297 (1969) 30

State v. Valdez,
19 Utah 2d 426, 432 P.2d 53 (1967) 30

Swain v. Salt Lake Real Estate and
Investment Company, 3 Utah 2d 121,
279 P.2d 709 (1955) 37-38

Town and Country Disposal, Inc. v. Martin,
563 P.2d 195 (Utah 1977) 12

Wells Fargo Bank, N.A., v. Midwest Realty
& Finance, Inc., 544 P.2d 882
(Utah 1975) 23-24

AUTHORITIES CITED

	Page
29 American Jurisprudence (2d), Evidence §193	16
29 American Jurisprudence (2d), Evidence §196	16
75 American Jurisprudence (2d), Trial §167	30
17 Corpus Juris Secundum, Contracts §229(5)	7
Utah Rules of Evidence, Rule 63	31-33

IN THE SUPREME COURT OF THE STATE OF UTAH

---oooOooo---

INSURANCE COMPANY OF NORTH AMERICA,	:	BRIEF OF RESPONDENT
Plaintiff-Respondent,	:	
v.	:	
LANSEAIR TRAVEL AGENCY, INC., PREBEN H. NIELSEN, et al,	:	Case No. 16604
Defendants-Appellants.	:	

---oooOooo---

NATURE OF CASE

Plaintiff-respondent Insurance Company of North America (hereinafter "INA") commenced this action in the Third District Court of Salt Lake County, seeking to enforce an indemnity agreement that defendant-appellant Preben H. Nielsen (hereinafter "defendant Nielsen") executed personally as well as on behalf of his corporation, Lanseair Travel Agency, Inc., (hereinafter "Lanseair").

DISPOSITION IN LOWER COURT

This matter was tried before the Honorable James S. Sawaya on January 25 and 26, 1979. Defendant Lanseair Travel Agency, Inc., filed no answer and made no appearance

and its default was entered. (R. at 195.) An order of dismissal was entered as to defendant Rulon DeYoung on February 6, 1979 (R. at 355-56); thereafter, Judge Sawaya entered judgment against Lanseair and defendant Nielsen on March 19, 1979. (R. at 397-98.) Defendant Nielsen's Motion (R. at 399-407) to Alter or Amend the Judgment was denied on July 23, 1979. (R. at 412-13.) The dismissal of Rulon DeYoung and the Judgment against Lanseair have not been appealed.

RELIEF SOUGHT ON APPEAL

INA respectfully requests that this Court affirm the Judgment entered against defendant Nielsen and, on the basis of its cross-appeal (R. at 422-23), order an additional award of attorney's fees.

STATEMENT OF FACTS

Defendant Nielsen made application to INA for the inclusion of his Lanseair Travel Agency, Inc., on a Schedule Bond by which INA bonded numerous other travel agencies. (Tr. at 6; R. at 577.) The issuance of such a bond was a necessary prerequisite for Lanseair to gain appointment as a travel agent by the Air Traffic Conference of America (hereinafter "the ATC"). (Tr. at 144; R. at 715.) The ATC is an airline industry association that acts as a clearing house for airline passenger tickets on behalf of travel agencies and the various airlines. (Id.)

In order to induce INA to bond Lanseair, which was a new and unproven corporation lacking any experience in the travel agency business, both Lanseair and defendant Nielsen (who was its majority stockholder, president, and secretary and also a member of its board of directors) executed an indemnity agreement. (Tr. at 4; R. at 575.) By this agreement, Lanseair and defendant Nielsen agreed faithfully to perform all of their obligations to the ATC and to indemnify INA from any loss, costs, attorney's fees, or other expenses which INA might sustain as a result of having included Lanseair on its Schedule Bond "or any continuation thereof." The personal indemnity agreement also provided that INA should

> have the exclusive right to adjust, settle, or compromise any 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 [defendant Nielsen] . . . .

Based upon defendant Nielsen's application on behalf of Lanseair and his personal indemnity agreement, INA bonded Lanseair under its Schedule Bond. (Tr. at 150-52; R. at 721-23.) As a result, Lanseair was enabled to enter into a sales agency agreement with the ATC. (Exhibit 8-P.) This sales agency agreement, which remained in force through September, 1974, permitted Lanseair to operate as a travel agency and to sell and issue tickets on behalf of the

various airlines. Under the terms of the agreement, Lanseair was obligated to remit to ATC on the 10th, 20th, and last day of each month the net value of all airline tickets issued during that reporting period, less its commissions. (Tr. at 112; R. at 683.)

The checks (Exhibits 10-P and 11-P) issued to the ATC for the first two reporting periods in September, 1974, were dishonored by Lanseair's bank. (Tr. at 158-59; R. at 729-30.) Thereafter, Lanseair did not attempt to make further remittances to the ATC. (Tr. at 234; R. at 805.) The dishonor of these checks and Lanseair's failure to remit thereafter constituted defaults under its sales agency agreement. (R. at 389.) The ATC was protected from such default, to the extent of $10,000, by INA's bond. (R. at 383-84 and 388.)

Both INA and the ATC notified defendant Nielsen of Lanseair's defaults. (Exhibits 2-P and 3-P; also Tr. at 160.) INA also advised him that it would seek reimbursement under his personal indemnity agreement. (Exhibit 2-P.) Defendant Nielsen responded only with the assertion that a letter he claimed to have written to the ATC on August 23, 1974, shielded him from all possible liability; he made no effort to cure or minimize Lanseair's default. (Exhibits 2-P and 3-P.)

Lanseair had issued on behalf of seven airlines a total of some $15,000 worth of domestic airline passenger tickets for which it made no remittance to the ATC. (Tr. at 183; R. at 754.) In accordance with the usual industry practices, the various airlines submitted to the ATC documentation of the passenger tickets with respect to which Lanseair had defaulted. (Exhibit 37-P and Tr. at 167.) Based upon this documentation, the ATC filed a claim against INA under the provisions of the Schedule Bond. (Exhibit 28-P and Tr. at 168-70.) On January 22, 1975, INA paid $10,000 to the ATC, which amount represented its full bond limit with respect to Lanseair. (Exhibit 32-P and Tr. at 173-74.) This $10,000 payment was subsequently disbursed on a pro rata basis to the various airlines that had sustained a loss on account of Lanseair's default. (Tr. at 175-177; R. at 746-48.)

By this action, INA seeks to recover this loss, its expenses and attorney's fees from defendant Nielsen on the basis of his personal indemnity agreement.

ARGUMENT

I. APPELLANT HAS FAILED TO DEMONSTRATE ANY REVERSIBLE ERROR.

Even though he made no effort to secure their presence, defendant Nielsen complains vociferously that no

employees of INA were present at the trial and protests that the trial judge did not view the facts and testimony in a light favorable to him. While defendant Nielsen's disenchantment with the outcome of the trial is understandable, his complaints do not constitute grounds for reversal.

A. Upon Introduction of the Indemnity Agreement and the Canceled Check by Which Payment Under the Bond Was Made, Plaintiff INA Established a Prima Facie Case.

Both commercial and informal sureties commonly require that the principal whose performance they are about to guarantee agree to indemnify them in the event that they are called upon to cure a default. Such agreements not only afford the surety a measure of protection in the event of a default, they also discourage needless default. These indemnity agreements commonly contain either a "conclusive evidence" or a "prima facie evidence" clause. The present indemnity agreement contains the latter type, the so-called "prima facie evidence" clause. The admitted purpose of such clauses is to relieve the surety from the enormous task of having to prove every element of its principal's default and the obligee's loss in order to recover from an indemnitor.

Although there is some split of authority among the jurisdictions as to whether "conclusive evidence" clauses are enforceable, the overwhelming majority of

jurisdictions, if not all, routinely enforce "prima facie evidence" clauses. Corpus Juris Secundum reports that:

> [A] "conclusive evidence" clause of an indemnity contract, that a voucher showing payment shall be conclusive evidence of the liability, has been held void, although the contrary has also been held; and such a clause also has been sustained if containing or permitting an exception in the case of fraud.
>
> A clause that in case of the payment of a compromise sum by a surety company in settlement, an itemized statement thereof, verified by the company officers, shall be prima facie evidence of the fact and extent of the indemnitor's liability has been sustained. . . .

17 C.J.S. Contracts, §229(5) (footnotes omitted, emphasis added). The indemnity agreement presently before this Court contains the provision that "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 defendant Nielsen. (Exhibit 1-P.)

This Court noted without comment or concern the existence of a similar "prima facie evidence" clause in the indemnity agreement at issue in Hartford Accident and Indemnity Company v. Clegg, 103 Utah 414, 135 P.2d 919 (1943). Therefore, while this Court has never expressly ruled upon the precise issue, it is apparent that Utah follows the universally accepted proposition that "prima facie evidence" clauses are enforceable.

In Standard Accident Insurance Company v. Fell, 2 So.2d 519 (La. 1941), a personal indemnitor challenged the enforceability of a conclusive evidence clause by which he had agreed "that the vouchers . . . showing payment by the company of any claim . . . shall be conclusive evidence of the fact and amount of liability . . . provided that such payment shall have been made by the company in good faith. . . . " 2 So.2d at 524. At the trial, the bonding company placed in evidence the application that contained the indemnity agreement and its canceled check that had been issued in payment to the obligee. 2 So.2d at 522. On appeal, the personal indemnitor argued that a sufficient case against him had not been established since the bonding company had not proven that the obligee had in fact sustained a loss on account of the principal's default. The appellate court rejected this contention, noting its approval of the proposition that:

> Such stipulations as the one under consideration should be held to be conclusive upon the "risk" [i.e., the principal] in an action brought against him by the insurer to recover indemnity for any moneys paid by it to the insured in settlement of a loss coming within the terms of a policy of guaranty insurance, in the absence of fraud or collusion between the insurer and the insured. It is unconscionable, in our opinion, that the insurer, after settling in good faith a loss under the policy with the insured, should be compelled to bear the burden of

> protracted litigation with the "risk", in order to recover reimbursement for moneys so expended for the use and benefit of such "risk".

2 So.2d at 525 (citations omitted, emphasis added). Likewise, it would have been unreasonable and impractical for the trial court to have insisted that, having bonded Lanseair in reliance upon defendant Nielsen's personal indemnity agreement and having made good Lanseair's default in its obligations to the ATC, INA formally prove each and every element of Lanseair's default. It would have been particularly unreasonable for the trial court to have required such formal proof from INA in view of the fact that defendant Nielsen presented no evidence whatsoever of any bad faith on the part of INA and, moreover, did not even raise that issue in his pleadings.

In Fidelity and Casualty Company of New York v. Harrison, 274 S.W. 1002 (Texas 1925), a "conclusive evidence" clause was held to be enforceable notwithstanding that the personal indemnitor had proven to the satisfaction of a jury that the obligee in fact had not been entitled to payment from the surety. The personal indemnitor had purchased "traveler's checks" from the American Express Company. Some of these checks had been lost and, in seeking replacements, he had been required to provide a bond to guarantee his statement that he had not voluntarily disposed of the

checks. The bonding company in turn required that he execute an indemnity agreement that contained a provision that any "voucher or other evidence of payment" by the bonding company would constitute conclusive evidence of the loss. The missing checks were later negotiated with forged signatures and, when they were eventually received by American Express, a claim was made against the bonding company, which paid the value of the checks. Thereafter, the bonding company sought to recover this loss from the personal indemnitor on the basis of the conclusive evidence clause. The trial court refused to enforce the clause because the jury found that the signatures on the negotiated checks were forgeries and that American Express should not have made payment. On appeal, however, it was held that this question was beyond the scope of the appropriate inquiry since the bonding company had proven that it had paid American Express and the personal indemnitor had agreed that such proof would constitute conclusive evidence of his liability to the bonding company. In so holding, the court indicated its approval of the proposition that:

> The expense, delay, trouble, and risk of loss to the guarantee company is a sufficient safeguard against an unwarranted payment; and, without such a stipulation as complained of here, guarantee companies could not safely do business anything like as cheaply as they do, and to the evident

> advantage of the parties and of the general public.

274 S.W. at 1004-05. If a conclusive evidence clause such as was at issue in Harrison is enforceable, then, a fortiori a mere prima facie evidence clause such as that agreed to by defendant Nielsen in this action must be fully enforceable. Such clauses were also enforced in Carroll v. National Surety Company, 24 F.2d 268 (D.C. Cir. 1928), and in Lander v. Phoenix Indemnity Company, 329 S.W.2d 951 (Texas 1959).

In this case, defendant Nielsen's indemnity agreement (Exhibit 1-P) was admitted without objection. (Tr. at 6; R. at 577.) Additionally, the canceled check by which INA made payment to the ATC on account of Lanseair's default was admitted in evidence as Exhibit 32-P. Defendant Nielsen's only objection to this exhibit was that it was hearsay:

> MR. DART: We offer Exhibits 29 and 32, Your Honor.
>
> MR. GARRETT: My objection, of course, Your Honor, is based upon the fact the check is issued on hearsay piled on hearsay.

Transcript at 174 (R. at 745). The check, of course, is not hearsay: it was not admitted to prove the truth of anything stated in it, rather it was admitted for the purpose of proving that INA in fact paid the sum of $10,000 to the ATC. Accordingly, the only objection raised to the admission of

this exhibit was totally without merit.

Considering only Exhibits 1-P and 32-P, INA established a prima facie case. From that point on, it was incumbent upon defendant Nielsen to introduce sufficient testimony or evidence to prove the invalidity of INA's prima facie case. As will be demonstrated infra, not only did defendant Nielsen fail to prove any defense to INA's case, INA went much further and actually proved Lanseair's default through direct evidence.

B. The Trial Court's Findings of Fact Are Presumed Valid and Will Not Be Disturbed If Based upon Any Substantial Evidence.

In this action, INA seeks only to enforce defendant Nielsen's written contract through the recovery of money damages; therefore, this is an action at law rather than in equity. The Findings of Fact made by the trial court are to be indulged with a presumption of validity and will not be disturbed by this Court on appeal if there is any substantial evidence in the Record to support them. Town and Country Disposal, Inc. v. Martin, 563 P.2d 195 (Utah 1977) ("[T]he findings and judgment of the trial court should not be upset on appeal if there exists any substantial evidence in the record supportive of the lower court's conclusions."). R. C. Tolman Construction Company, Inc., v. Myton Water

Association, 563 P.2d 780 (Utah 1977); Dockstader v. Walker, 29 Utah 2d 370, 510 P.2d 526 (1973) ("[I]t is our duty to sustain the ruling of the trial court where there is competent evidence to sustain it."); Nance v. City of Provo, 29 Utah 2d 340, 509 P.2d 365 (1973) ("It is our duty on appeal to affirm the trial court in its findings of fact where there is competent evidence to support those findings.").

This Court has frequently reiterated that the trial court's Findings of Fact are presumed vaild, and held that those findings are to be disturbed only when there is no evidence to support them. For example, in Bramel v. Utah State Road Commission, 24 Utah 2d 50, 465 P.2d 534 (1970) this Court held that the fundamental rule of appellate procedure was that:

> [I]t is the trial judge's prerogative to find the facts; and this includes judging the credibility of the witnesses and the evidence, and drawing whatever reasonable inferences may fairly be derived therefrom. It is therefore . . . accurate to say that on review we survey the evidence in the light favorable to the findings, whichever party they may favor; and that they will not be disburbed on appeal if they are supported by substantial evidence.

465 P.2d at 535-36 (footnote omitted).

In his challenge to the Findings, defendant Nielsen charges that they "are contrary to the manifest weight of the evidence." (Br. App. at 11.) This is not only a mis-

statement of the applicable standard, it is also a tacit admission that there is evidence in the Record that supports the Findings. This Court's observation in Cannon v. Wright, 531 P.2d 1290 (Utah 1975), is directly applicable to defendant Nielsen's contention:

> [The appellant] misconceives and misstates his duty on appeal in attempting to upset the findings and judgment. His brief states that the trial court erred in making the above stated findings against "the clear weight of the evidence." This is not an equity case, but a law case, wherein any substantial evidence will support the findings and judgment.

531 P.2d at 1292 (footnote omitted, emphasis added). Accordingly, so long as there is some substantial evidence in the Record to support the trial court's Findings, this Court will not disturb those findings.

C. Defendant Nielsen Has Utterly Failed to Demonstrate that His Personal Indemnity Agreement Was Revoked Prior to Lanseair's Default.

Defendant Nielsen's entire contention that his personal indemnity agreement was revoked prior to the default of Lanseair is predicated upon a letter that he alleges he wrote and mailed to the ATC on August 23, 1974. Defendant Nielsen's "yellow copy" of this alleged letter was admitted as Exhibit 46-D.

(1) The Alleged Letter Was Never Received.

The only evidence of the preparation or mailing of this letter was that given by defendant Nielsen himself. (Tr. at 77-78; R. at 648-49.) On the other hand, Mrs. Darlene Dolan, an employee of the ATC, testified that she had with her all of the ATC's files relating to Lanseair; that she had searched those files for the original or any copy of this letter; and that she had been unable to find either the letter or any evidence that it had ever been received. (Tr. at 186-80; R. at 757-60.) Mrs. Dolan also testified that, had such a letter been received, a change-of-ownership procedure would have been commenced by the ATC. (Tr. at 189-90; R. at 760-61.) It was her testimony, however, that no such procedure was in fact commenced. (Id.) Moreover, while defendant Nielsen testified that the alleged letter had been mailed to the ATC at 1000 Connecticut Avenue in the District of Columbia, Mrs. Dolan's uncontradicted testimony was that the ATC had moved to another address some two years before the date of the alleged letter and mail was no longer forwarded. (Tr. 206-07; R. at 777-78.)

Based upon this testimony, the trial court concluded that defendant Nielsen had failed to prove that the alleged letter of August 23, 1974, had ever been received by the ATC. (R. at 384-85 and 388-89.) The trial court's Findings and Conclusions with respect to the alleged letter are

entirely correct. Although a presumption does arise that a letter was delivered from testimony that it was mailed, this presumption is dependent upon the letter being correctly addressed and is completely rebutted by evidence that it was not received. American Jursiprudence reports the rule as being that:

> Where proof is given that a letter has been duly mailed, a presumption of the receipt of the letter by the sendee arises. On the other hand, proof of the failure of a letter to arive at its destination raises a presumption that it was never mailed. . . .

29 AmJur 2d Evidence, §193 at 246. The presumption of receipt, however, is totally dependent upon the letter being properly addressed:

> A correct address is one of the essential elements on which the presumption of the receipt of a letter from evidence of its proper mailing is founded; as a general rule, a failure to show that the letter was correctly addressed will deprive the sender of the benefit of such presumption. . . . There is no presumption that the addressee of a letter received it from the fact that it was not returned to the sender, if it was not directed to the place at which the addressee resided at the time.

29 AmJur 2d Evidence, §196 at 249-50.

This principle has been accepted by this Court. For example, in Campbell v. Gowans, 35 Utah 268, 100 Pac. 397 (1909), a witness testified that he wrote and mailed a letter containing directions material to the suit. As in

this case, there was also testimony that the letter had not been received by the addressee. This Court held:

> The mailing of a letter postpaid and properly addressed to a person shown to reside in a city or town to which the letter was addressed creates no legal presumption, but a presumption or inference of fact, that it reached its destination. . . . The testimony of the witness . . . is therefore some evidence that the letter testified to by him was received . . . in the due course of mail. The defendants, however, testified that no such letter as testified to . . . was received by them. On such question we think the evidence preponderates in favor of the defendants . . . .

100 Pac. at 403 (citation omitted, emphasis added). Likewise, in this case, the trial court's Finding that the alleged letter was never received is well supported by the Record.

Moreover, even if defendant Nielsen had proven that his alleged letter of August 23, 1974, had actually been delivered to the ATC, there are at least three further conclusive reasons why that letter could not serve as a valid defense. A finding in favor of INA on any one of these would be sufficient to affirm the judgment.

(2) The ATC Was Not INA's Agent. The alleged letter upon which defendant Nielsen relies so heavily was directed to the ATC, not to INA. The trial court found that since the ATC was not INA's agent, notice to the ATC would have been insufficient to terminate defendant Nielsen's

obligations to INA. (R. at 390.)

In an effort to demonstrate that the ATC was somehow INA's agent in connection with the Lanseair bond, defendant Nielsen relies upon two theories. Neither has any merit. The first is that the bond application (Exhibit 1-P) stated that it was to be given by the travel agent to the ATC. In support of this theory, defendant Nielsen relies solely upon the following title which appears on the reverse side of the application form:

> Application for bond given by travel agent to Air Traffic Conference, Washington, D. C.

Even a casual consideration of the language will reveal that the phrase "given by travel agent to Air Traffic Conference" indicates to whom the bond is to be given, not to whom the application for the bond is to be given. The trial court so found. (R. at 382.)

The second prong of defendant Nielsen's contention is that the application containing the personal indemnity agreement (Exhibit 1-P) was provided to him by the ATC. (See, e.g., Br. App. at 4.) As manager of the ATC's Financial Affairs Division it was Mrs. Darlene Dolan's responsibility to verify that travel agents were bonded and handle the claims in the event of defaults. It was her uncontradicted testimony that the ATC received bonds from many sureties (Tr. at 150; R. at 721) and that the ATC never provided

prospective travel agents with bond applications (Tr. at 185-86; R. at 756-57). Moreover, defendant Nielsen's repeated protestations (e.g., Tr. at 77; R. at 648) that he had never dealt with, nor even heard of, INA are conclusively refuted by Exhibit 6-P, which contains a letter in which he states "we have applied to Insurance Company of North America for transfer present bond to our name." (Tr. at 83-84; R. at 654-55.) There is a great deal of substantial, credible evidence not only that the ATC was not INA's agent in connection with the Lanseair bond but also that defendant Nielsen knew precisely with whom he was dealing.

Additionally, even if the ATC had acted as an intermediary in connection with defendant Nielsen's negotiations with INA, the ATC would not thereby have become an agent of INA for the purpose of receiving notification of defendant Nielsen's desire to terminate his obligations as personal indemnitor. A case meeting the precise question whether the rights of a bonding company against its indemnitor can be prejudiced by the acts and knowledge of the obligee is Insurance Company of North America v. Brehm, 478 P.2d 387 (Ore. 1970). In that case, the obligee actually provided the principal with an application to the bonding company, which issued a bond upon receipt of his indemnity agreement.

After sustaining a loss on the bond, the surety sought reimbursement from the indemnitor, who defended on the basis that recovery was barred by misrepresentations made by the obligee. The Oregon Supreme Court rejected all such claims, holding:

> Before learning of the alleged misrepresentations, [the bonding company] in good faith had accepted liability to the bank relative to the transaction in question under its bond. This is, we think, a material change of position induced by [the indemnitors'] promise. As to [the bonding company], the transaction was no longer voidable.

478 P.2d at 391. Accordingly, the trial court correctly rejected defendant Nielsen's contention that his alleged letter to the ATC could somehow relieve him of his contractual obligations to INA.

(3) The Attempted Revocation Was Not Timely. Defendant Nielsen's alleged letter to the ATC could not have relieved him of his obligations to INA even if it had been received because the Lanseair default occurred before the revocation could have become effective. Even assuming, arguendo, that defendant Nielsen's personal indemnity obligation to INA was revocable, it could be terminated only upon sufficient notice to allow INA to protect its interests.

The practical and just proposition that one desiring to terminate an indemnity agreement must give

sufficient notice to permit the surety, in turn, to protect its interests has long been accepted. For example, such a rule was recognized and applied by the Idaho Supreme Court in American Surety Company v. Blake, 261 Pac. 239 (Idaho 1927). After sustaining a loss on a bank's bond, the surety brought an action against the indemnitor, who then claimed to have sent notice to the surety that he was no longer associated with the bank and was revoking his indemnity agreement. The Idaho Supreme Court held that the indemnitor's liability would not be terminated immediately upon the receipt of such notice, but only upon the expiration of a period of time sufficient for the surety to take reasonable steps to protect itself:

> It is true that the notice of the indemnitors to the surety company was sufficient to absolve them from further liability accruing after a reasonable time within which the surety could secure its own release, if it chose, by giving notice of withdrawal . . . .

261 Pac. at 241 (emphasis added). Accordingly, while a personal indemnitor may be able to terminate his undertaking upon notice, he must allow his surety a sufficient length of time to protect its interests.

Contrary to defendant Nielsen's assertion in his Brief (Br. App. at 11), the requirement of reasonable notice was reaffirmed by the Idaho Supreme Court in the second

appeal in the Blake case:

> On the former appeal of this case to this court, it was definitely held that the indemnitors to the surety company could, by notice, absolve themselves from liability, after a reasonable time in which the surety could secure its own release from obligation to the state.

American Surety Company of New York v. Blake, 27 P.2d 972 at 974 (Idaho 1933) (emphasis added). In this case, the bond under which Lanseair was included at defendant Nielsen's request required INA to give the ATC at least 30 days advance notice of its intention to terminate coverage as to Lanseair. (See, Point I(D), infra.) Accordingly, defendant Nielsen would have to have given INA at least 30 days notice before his obligation as personal indemnitor could have been terminated. Since the Lanseair default occurred within 30 days of the date of the alleged letter, his obligation with respect to the Lanseair default would have been unaffected.

(4) The Alleged Letter Is Not Sufficient.

The alleged letter of August 23, 1974, could not have terminated defendant Nielsen's obligation to INA because it does not contain a plain statement that he is revoking his indemnity agreement. The alleged letter recites that defendant Nielsen and E. L. Hardy have sold their Lanseair stock to Rulon DeYoung, who will thereafter have control of the business and then states:

> 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 personal liability or guaranty with the ATC Bond. Please notify your bonding company of this change.

Exhibit 46-D (emphasis added). The only request is that the ATC notify its "bonding company of this change." First, INA was Lanseair's bonding company, not the ATC's. Moreover, the letter only requests that the ATC notify INA of the change of ownership. It does not even request that INA be advised that defendant Nielsen wishes to revoke his personal indemnity agreement.

This Court recently articulated the standards which notice must meet in order to terminate a guarantee agreement. Presumably, notice would also have to meet the same standards in order to terminate a contract of indemnity. In Wells Fargo Bank, N. A. v. Midwest Realty & Finance, Inc., 544 P.2d 882 (Utah 1975), this Court held:

> By duly executing . . . continuing guaranties, knowing that others . . . would rely and act thereon, defendant became bound thereby until the guaranties were properly revoked or terminated. While this could be done by written notice, it is only fair and reasonable that the notice must be clear and unequivocal.

544 P.2d at 884 (emphasis added). Applying this rule, this Court held that a letter stating that "we will withdraw the

Continuing Guaranty" but also requesting that "the guaranty be immediately reduced" to a given amount was not sufficient either to terminate or to reduce the guarantor's obligation. In this case, the alleged letter does not even request that INA be notified that defendant Nielsen wishes to revoke his personal indemnity agreement; rather, it merely asks that the ATC notify INA of the change of ownership.

The facts of Insurance Company of North America v. Hoyt, 419 F.2d 1148 (7th Cir. 1969), parallel precisely the facts of the present case. In Hoyt, the majority stockholder in a travel agency executed a personal indemnity agreement with INA in consideration of its inclusion of his travel agency on a Schedule Bond guaranteeing the agency's remittances to the ATC. This agreement contained the precise language at issue here. Shortly after a purported sale of the personal indemnitor's stock, the travel agency defaulted. The ATC filed a sworn proof-of-loss with INA and INA paid its coverage limit. INA then sued the personal indemnitor, seeking reimbursement of its loss and expenses.

The personal indemnitor in Hoyt defended INA's action on the basis that he had placed a telephone call to an INA executive informing him that he wished to be relieved of his indemnity obligation. Characterizing this communication of a mere expression of the indemnitor's desires, the court rejected the claim that the indemnitor's obligation

had been terminated:

> [W]e hold as a matter of law that there was no cancellation of [the indemnitor's] liability as indemnitor of [INA's] surety obligation before default. The question is not whether [the personal indemnitor] "wanted" to cancel his indemnity obligation, but rather whether what he actually did had the effect of cancellation.

419 F.2d at 1151 (emphasis added). Defendant Nielsen's alleged communication to the ATC--not even to INA--expressing his desire that his indemnity obligation be canceled is, therfore, not sufficient to relieve him of liability under his express promise to indemnify INA.

D. Lanseair's Default Occurred While the ATC Was Entitled to Protection under the Bond.

It is defendant Nielsen's secondary contention in this appeal that INA's payment to the ATC on account of the Lanseair default was gratituous and, therefore, he has no obligation under his personal indemnity agreement. The trial court ruled against defendant Nielsen on this point, finding that the Schedule Bond remained in effect, as to Lanseair, through October 10, 1974, (R. at 384 and 388) but that the defaults occurred in September, 1974 (R. at 386 and 389). These Findings are supported by substantial evidence and defendant Nielsen has failed to demonstrate any error.

The bond under which Lanseair was included provided,

in pertinent part, that:

> If Surety shall so elect, liability assumed with respect to any named Travel Agent may be canceled 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.

Exhibit 15-P at ¶4 (emphasis added). Accordingly, INA could terminate its obligation under the Schedule Bond only by giving 30 days notice. Defendant Nielsen acknowledges in his Brief that the annual premium due September 1, 1974, was never paid. (Br. App. at 13.) Within ten days after Lanseair's premium payment became delinquent, INA acted to protect not only its interests but also those of defendant Nielsen by giving the required 30 days notice both to the ATC and to Lanseair that the inclusion of Lanseair would be terminated effective October 10, 1974. (Exhibits 9-P and 20-P.) It was the testimony of Mrs. Darlene Dolan that, in this respect, INA acted in its usual manner. (Tr. at 193; R. at 764.) Accordingly, the trial court's Finding that INA's bond obligation to the ATC remained in force with respect to Lanseair through the date of the loss is supported by substantial evidence.

The personal indemnity agreement that defendant Nielsen executed expressly provides that it covers losses

under the "Schedule Bond, or any continuation thereof or any successory obligation in the same or a different amount . . . ." (Exhibit 1-P). This precise language was construed by the court in Insurance Company of North America v. Hoyt, supra. In that case, the travel agency first applied for inclusion under INA's Schedule Bond for the calendar year 1963. As in this case, both the corporate travel agency and the personal indemnitor were required to execute indemnity agreements. The travel agency again applied for inclusion under the Schedule Bond for the year 1964 and the personal indemnitor was again requested to sign an indemnity agreement. In 1965, the travel agency paid the annual premium, but the personal indemnitor was not asked to sign a separate indemnity agreement. The travel agency defaulted during 1965, and INA was compelled to make payment to the ATC under its bond. Thereafter, INA sought reimbursement from the personal indemnitor, who defended on the basis that his personal indemnity agreement, which had been executed in 1964, had expired. The court rejected this contention, holding:

> We think the agreements plainly bind both [the travel agency and the personal indemnitor] to continue as indemnitors as long as [the agency] was "included . . . in the aforesaid Schedule Bond, or any continuation thereof." [The agency] paid the premium for 1965 and was included

> in the Schedule Bond. [The personal indemnitor's] indemnity obligation accordingly remained . . . .
>
> There is no merit therefore in the argument that the personal indemnity had expired by its own terms before the June 1965 loss. 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. [The travel agency] paid the premium for the bond coverage for the full year of 1965 and thus the agreements were in effect during that year. . . . 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.

419 F.2d at 1150-51. By the same reasoning, defendant Nielsen's obligation to INA continued in this case until INA had been able to relieve itself of its obligations to the ATC by giving the required 30-day notice. Defendant Nielsen relies upon the last sentence quoted above, claiming that it means that his obligations ceased immediately upon the failure of Lanseair to pay its premium. The rationale behind the court's opinion, however, makes clear that the personal indemnitor's obligations were to be concurrent with and to continue so long as INA's obligations to the ATC.

When Lanseair failed to pay its annual premium, INA immediately gave the ATC the required 30-day notice. The default of Lanseair occurred within that 30-day period; therefore, the default was covered under the bond. Defendant Nielsen's obligations to INA continued until INA had

successfully relieved itself of its obligations to the ATC. The trial court's ruling so finding is supported by the uncontradicted evidence.

E. The Trial Court's Evidentiary Rulings Are Correct, but Any Technical Errors Are Harmless in Any Event. Defendant Nielsen challenges the trial court's decision to receive in evidence a number of exhibits unfavorable to him. None of these challenges is valid.

(1) The Schedule Bond. The Schedule Bond (Exhibit 15-P) was admitted by the trial court over defendant Nielsen's objection. A review of the Transcript will reveal, however, that the only objection to the admission of this bond was that it was hearsay:

> MR. GARRETT: If Your Honor please, we object to Exhibit 15 on the grounds that there is no proper foundation showing that Lanseair Travel had any knowledge of the contents of this bond. It's hearsay as far as they are concerned.

Transcript at 152-53 (R. at 723-24). The objection that the bond was hearsay is without merit because the bond was admitted not for the purpose of proving the truth of any statement contained in it, but rather for the purpose of establishing its terms and provisions and the conditions of INA's obligation to the ATC. Any objection that the copy of the bond actually received as Exhibit 15-P was not the best evidence

of the provisions of the Schedule Bond was waived since, as reported by American Jurisprudence, the rule is that on appeal a party will be limited

> to the specific objections to evidence made at the trial, and the appellate court will consider only such grounds of objection as are specified. In other words, a party is confined to the specific objections made by him and can have the benefit of no others.

75 AmJur 2d Trial, §167 at 255. See also, State v. Kelbach, 23 Utah 2d 231, 461 P.2d 297 (1969); State v. Valdez, 19 Utah 2d 426, 432 P.2d 53 (1967); Porcupine Reservoir Company v. Lloyd W. Keller Corporation, 15 Utah 2d 318, 392 P.2d 620 (1964); Pettingill v. Perkins, 2 Utah 2d 266, 272 P.2d 185 (1954).

Moreover, even if viewed as hearsay, the exhibit was clearly admissible under the business records exception. The trial court's admission of the exhibit was entirely proper.

(2) The Documents Received by the ATC.

Defendant Nielsen also complains (Br. App. at 19-20) that the trial court admitted exhibits and permitted testimony of loss substantiation submitted to the ATC by the airlines. Mrs. Darlene Dolan evaluated these claims and relied upon them in preparing the proof-of-loss submitted to INA. (Tr. at 167-68; R. at 738-39.) For example, Exhibit 37-P is a compilation of the claims in regard to the Lanseair default

(complete with supporting photostatic copies of passenger tickets and debit memos) submitted by the airlines to the ATC; Exhibit 36-P is a CPA's verification of the airlines' claims which was received by Mrs. Dolan as an attachment to INA's request (Exhibit 27-P) that a formal proof-of-loss be prepared and submitted; and Exhibit 28-P is the formal proof-of-loss sworn to by Mrs. Dolan on behalf of the ATC and submitted to INA.

At trial, defendant Nielsen objected to the admission of these exhibits as hearsay. The court admitted the exhibits on the basis that even if hearsay they were admissible under the so-called business records exception to Rule 63 of the Utah Rules of Evidence, which provides:

> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> . . . .
>
> (13) Business entries and the like. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were

> such as to indicate their trustworthiness . . . .

Rule 63 Utah Rules of Evidence (emphasis added). The proof-of-loss (Exhibit 28-P), the airlines' claims (Exhibit 37-P), and the evaluation thereof (Exhibits 27-P and 36-P) were admitted not to prove the truth of the statements made therein (i.e. that a loss in a certain dollar amount had occurred), but to prove that INA had demanded and received reasonable evidence from the ATC of the losses sustained as a result of Lanseair's default. For this purpose, the exhibits are not hearsay. All other possible objections to the admission of these exhibits were waived by defendant Nielsen's failure to bring such grounds, if any, to the attention of the trial court. (Point I(E)(1), supra.)

Moreover, even if these exhibits do constitute hearsay, they were admissible under the business records exception. Each of these exhibits was produced by Mrs. Darlene Dolan from the files of the ATC, which it was her responsibility to maintain and control. (Tr. at 146-47; R. at 747-48.) The trustworthiness of the documents is attested to by the fact that they were routinely produced by several of the airlines that comprise the ATC. There would simply be no reason for a national airline to falsify its records so as to enable INA to impose an unjust obligation against defendant Nielsen. Implicit in the trial court's admission

of these documents is a finding of trustworthiness sufficient to satisfy the requirements of Rule 63(13).

Finally, even if the admission of all of these exhibits was erroneous, the error would be harmless. As noted above, with the introduction of the indemnity agreement (Exhibit 1-P) and the canceled check by which INA made payment to the ATC (Exhibit 32-P), INA established a prima facie case and the burden shifted to defendant Nielsen to demonstrate grounds sufficient to constitute a defense, which he failed to do. Therefore, even if all of the other exhibits received by the trial court were erroneously received, there is still sufficient evidence properly admitted to support the Judgment entered against defendant Nielsen.

(3) The Alleged Credits. Defendant Nielsen also contends that the trial court erred in refusing to admit Exhibit 45-D, which consisted of auditor's coupons, void flight coupons, and audit detail in connection with credit card sales. (Tr. at 247; R. at 818.) Defendant Nielsen claimed that these materials constituted a credit to be allowed as an offset against his liability to INA. The trial court, however, refused to admit the exhibit on the basis that neither defendant Nielsen nor anyone else had brought the alleged credits to the attention of INA prior

to its payment to the ATC on January 22, 1975. (Tr. at 25[illegible] 55; R. at 822-26.) The trial court thus found that defend[illegible] Nielsen had waived or become estopped to assert any claim [illegible] these credits by his dilatory conduct. (R. at 386 and 391.

Defendant Nielsen attempted to introduce the audi[illegible] detail allegedly constituting this credit through the testimony of Rulon DeYoung. It was Mr. DeYoung's own testimony, however, that these "credits" were not presented even to the ATC prior to INA's payment of the Lanseair claim:

> MR. DART: If I could voir dire one more question, during the time that you had these tickets that may or may not be credits, were they ever presented to the Air Traffic Conference to be treated by them and be reviewed by them to determine if they would give you a credit for them prior to February, 1975?
>
> MR. DeYOUNG: To my knowledge, no.

Transcript at 252 (R. at 823). Thus, when INA paid the ATC's claim on January 22, 1975, these alleged credits had never been mentioned; the Record firmly supports the trial court's ruling.

Moreover, when advised of the apparent Lanseair default, defendant Nielsen made no effort to bring any "credits" to the attention of either the ATC or INA; he merely proclaimed that his alleged letter of August 23, 19[illegible]

shielded him from all liability. Exhibit 3-P, for example, was received into evidence without objection. That exhibit is a copy both of INA's letter to defendant Nielsen and of his response, written across the bottom, that "the enclosed copy of letter mailed to Air Traffic Conference should be self-explanatory." He made no mention of "credits".

Likewise, in response to a similar notification from Marsh and McLennan, INA's broker in the District of Columbia, defendant Nielsen responded on November 4, 1974, merely with the assertion that he had relieved himself of all liability under the indemnity agreement. Again, he made no mention of the credits he now claims. (Exhibit 2-P.) Moreover, it is significant to note that in the course of making a proffer to the trial court, defendant Nielsen's counsel stated:

> I would further offer the fact that, Your Honor, when the first demand was made upon Lanseair and Mr. Nielsen by anyone in this matter and before the bonding company paid the claim that they were advised as to the existence of these credits.
>
> Now, I think there may be a letter that I can offer in support of that if I can have a moment--if I may have a moment, Your Honor.
>
> THE COURT: Why don't we take a recess at this point and give you a moment.

Transcript at 255-56 (R. at 826-27). When court resumed

session some twenty minutes later Mr. Garrett acknowledged:

> I have been unable to locate the letter that I thought existed. I thought it was in evidence to the bonding company concerning the credits.

Transcript at 256 (R. at 827). No such letter was ever offered on behalf of defendant Nielsen. Accordingly, the evidence is uncontradicted that INA had no notice of defendant Nielsen's claim to a credit or offset against his liability until after it had made payment to the ATC on January 22, 1975, based upon the proof-of-loss and extensive documentation submitted by the ATC.

II. THE ATTORNEYS FEES AWARDED TO INA SHOULD BE INCREASED.

The personal indemnity agreement signed by defendant Nielsen provides for the payment of "any and all loss, costs, charges, suits, damages, counsel fees, and expenses of whatever kind or nature . . . ." (Exhibit 1-P.) The original complaint in this action was filed on June 7, 1977. Since that time, defendant Nielsen has vigorously sought to avoid the obligations undertaken in his personal indemnity agreement. Following entry of Judgment on March 19, 1979, defendant Nielsen filed a Motion "to alter and amend findings of fact and conclusions of law and enter a new judgment" (R. at 399-410.) Following the denial of this Motion on

July 23, 1979 (R. at 412-13), defendant Nielsen filed his Notice of Appeal to this Court (R. at 414 and 426).

Accordingly, INA has been forced to continue the services of its attorneys not only to defend defendant Nielsen's post-judgment motions, but also to defend this appeal. Since defendant Nielsen has agreed that he will reimburse INA for all attorneys fees reasonably incurred, it is appropriate that the fees awarded to INA be increased in recognition of the additional services rendered since the entry of the original Judgment on March 19, 1979.

The propriety of an additional award on account of attorney's fees incurred on appeal was recognized by this Court in Swain v. Salt Lake Real Estate and Investment Company, 3 Utah 2d 121, 279 P.2d 709 (1955). The trial court in that case had refused to award any attorneys fees to the prevailing purchasers under a uniform real estate contract of which the vendor had sought to declare a forfeiture. This court reversed, holding:

> [W]e are of the opinion that the stipulated amount of such fee should cover services rendered in the court below and on appeal. Attorneys' fees on appeal are discretionary with this court . . . .

279 P.2d at 711 (emphasis added). Although this Court did not, in the cited case, make a specific award of attorneys fees on account of the appeal, the principle that such fees

may be awarded is clearly stated.

The precise question whether a surety is entitled to an additonal award against its personal indemnitor for attorneys fees incurred by the surety on appeal was reached by the Oregon Supreme Court in Hartford Accident and Indemnity Company v. Maus, 514 P.2d 61 (Ore. 1973). In that case, the surety brought an action against the personal indemnitor to recover a loss that it had paid on his behalf. The personal indemnitor prevailed at the trial court and the surety appealed. On appeal, the Supreme Court ruled in favor of the surety; thereafter, a petition was filed by the surety to recover its additional attorneys fees incurred on the appeal. The indemnity agreement, like that present in this case, provided that the personal indemnitor would pay "any and all liability for damages, loss, costs, charges, and expenses of whatsoever kind or nature (including counsel and attorney's fees) . . . ." 514 P.2d at 61. The Oregon Supreme Court held that, in view of this language, an additional award based upon the attorneys fees incurred by the surety should be entered against the personal indemnitor. The court awarded $1,500 in additional fees. 514 P.2d at 62.

In Maus, a surety appealing from an adverse judgment was held entitled to an award of additional

attorneys fees incurred on appeal; a fortiori, INA is entitled to an award of additional attorneys fees incurred in defending this appeal from a judgment in its favor.

However, in view of this Court's holding in Beckstrom v. Beckstrom, 578 P.2d 520 (Utah 1978), plaintiff-respondent INA hereby abandons the remaining portion of its cross-appeal in which it asserted that the trial court's award of only $3,000 in attorneys fees should be set aside since the uncontradicted evidence was that the reasonable amount of such fees was not less than $6,000.

CONCLUSION

There is much evidence to support each of the Findings made by the trial court, and defendant Nielsen has failed to delineate a single Finding that is not supported by substantial evidence. Upon the introduction of the personal indemnity agreement and the canceled check by which INA made payment on account of Lanseair's default, INA established a prima facie case against defendant Nielsen, which he failed to rebut.

As his principal line of defense, defendant Nielsen contends that his obligations to INA were terminated by an incorrectly addressed letter that he alleges he mailed to the ATC on August 23, 1974. An employee of the addressee testified that there was no indication of the letter having

ever been received, and the clear inference to be drawn fr her testimony was that the letter had not been received. The trial court's finding that the letter was never receive is well supported by the Record.

Even if the alleged letter had been received by the ATC, it would have been insufficient to terminate defendant Nielsen's obligation since the ATC was not an agent of INA. Additionally, even if received, the notice would not have been given in time to terminate defendant Nielsen's obligations prior to Lanseair's default because INA was entitled to a resonable time to protect its interes Finally, the letter upon which defendant Nielsen relies is not a clear and precise statement that he wishes to be relieved of his indemnity obligations; it is not addressed to the surety and it requests only that the ATC advise INA of the change of ownership.

Defendant Nielsen's secondary contention that th trial court erred in finding that the bond remained in forc at the time of this loss is, likewise, without merit. The Schedule Bond provided that INA could terminate its obliga- tion to the ATC only upon 30-day notice. Lanseair's premi to INA became delinquent September 1, 1974, and almost immediately thereafter INA gave notice to the ATC that the inclusion of Lanseair on the Schedule Bond would be termin October 10, 1974. Defendant Nielsen agreed that his persc

indemnity agreement should continue through "any continuation" of the bond, therefore, his contention that merely because the premium had become delinquent, he was automatically relieved of all liability is without merit.

Also without merit is defendant Nielsen's complaint that the trial court erred in admitting a copy of the Schedule Bond over his objection that it was hearsay. Since the bond was not offered to prove the truth of any statement it contained, but only to prove the terms and provisions of the bond, it did not constitute hearsay and was properly admitted. Any other possible basis of objection was waived by defendant Nielsen's failure to raise it. The same reasoning applies to the admission of documentation submitted to the ATC by the airlines. Moreover, even if viewed as hearsay, these exhibits were clearly admissible under the business record exception.

Defendant Nielsen's final complaint is that the trial court erred in failing to allow alleged credits as an offset. The trial court rejected evidence of these "credits" on the basis that defendant Nielsen had waived or become estopped to assert them against INA. In response to notification from INA of Lanseair's default and its intention to look to defendant Nielsen for reimbursement, defendant Nielsen replied merely that he had terminated his indemnity;

he made no effort to advise INA of the existence of the alleged credits. There is ample evidence to support the trial court's ruling that, not having been timely raised, these credits could not constitute an offset.

The personal indemnity agreement signed by defendant Nielsen expressly provides that he will reimburse INA for all attorneys fees and other expenses incurred. After the trial court awarded INA $3,000 as its attorneys fee, INA has been compelled to defend defendant Nielsen's post-judgment motions and this appeal. Accordingly, INA is entitled to an additional award representing the further attorneys fees incurred.

There being ample evidence in the record to support the trial court's judgment in favor of INA, that judgment must be affirmed; it is appropriate, however, that an additional award be made on account of the attorney's fees incurred by INA since trial.

RESPECTFULLY SUBMITTED this 14th day of March, 1980.

DART & STEGALL

By _____
John B. Parken

MAILING CERTIFICATE

I certify that I mailed two true and correct copies of the foregoing Respondent's Brief to Edward M. Garrett, Esq., 144 South 500 East, Salt Lake City, Utah 84102, this 25 day of March, 1980.