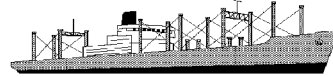




# Rollin' On



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## **DOUBLE PAYMENT OF FREIGHT CHARGES: *That's a spicy a meatball.***

A federal appellate court recently issued a decision which obligates the shipper to double payment of freight charges. If you are a carrier, you like the decision. Conversely, if you are a shipper, you are not thrilled about this decision.

The facts are not that uncommon. A carrier enters into a contract with an intermediary, such as a broker, whereby the carrier looks to get paid by the broker, which gets paid by its shipper customer. As time goes by, the shipper makes its payment to the broker, the broker pays the carrier, and everyone is happy.

That is, until the carrier receives a letter from the broker informing the carrier to look to the shipper for payment. Naturally, by this time, there are past due freight charges, in this case over 400K. The shipper says Whoa Nellie, I already paid the broker those freight charges. The carrier says I don't care who you paid or what you paid, I transported your cargo and you owe me for that. Everybody is pretty unhappy.

Now we take a wild guess and yes, a lawsuit is filed by the carrier, against both the shipper and the broker. As an aside, it's the same filing fee whether there are one or multiple defendants. There is an extra service fee for each defendant, which is usually modest. But if each defendant hires an attorney, the expense can go up since multiple attorneys do not help keep the expense down.

Each side files motions praising each side's respective case while simultaneously diminishing the assertions of the other party. There

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are no real disputed factual issues, as the decision is basically who gets stuck holding the bag. As such, no trial is necessary.

In this regard, the case was filed by the carrier in the local state court, since plaintiffs always like home cooking. Since the claim involved more than 75K, the out-of-state shipper had the case moved to federal court where "furiners", or out-of-staters, get treated better, or so the thinking goes. The local federal court rules in favor of the carrier, so the shipper, probably feeling that it nevertheless got homered, files an appeal.

We now enter the world of the federal appellate courts, and specifically, the 9<sup>th</sup> Circuit Court of Appeals which covers the western states. A few years ago, the U.S. Supreme Court agreed to hear 38 appeals from the 9<sup>th</sup> Circuit, and ended up reversing 37 of them. In fairness to the 9<sup>th</sup> Circuit, it decided thousands of cases that year, and the Supremes may have selected ones that it figured it would reverse. Still, the statistics are not comforting to clients.

On appeal, the court states that the shipper did not mark the nonrecourse provision of the bill of lading, which provides that the shipper is liable for payment of freight charges. The shipper makes three separate arguments why it should not be responsible for payment of the freight charges.

First, the shipper claims that the contract between the carrier and the broker waives the default liability provisions of the bill of lading. The

court says no way Jose. The contract never mentions the shipper by name, nor does it contain a provision precluding the carrier from seeking payment from the shipper. The court also states that although the bill of lading may allocate payment responsibility, the broker is not a party to the bill of lading. Carrier 1, shipper 0.

The shipper next states the contract between the carrier and the broker was the sole lawful contract and that the bills of lading are only receipts. The court says nice try. The court says that there is no "repugnancy" (makes you shiver doesn't it) between the contract and the bills of lading, which contains no price terms and does not address the shipper's liability for payment of freight charges (remember that the shipper was not a party to the contract). Carrier 2, shipper 0.

Finally, the shipper states that it is "an innocent party" and should not be required to pay twice. The shipper relies upon other cases where the shipper did not have to pay twice. The court distinguishes those cases and says they do not apply. The court also states the shipper, not the carrier, is in a better position to avoid exposure to double payment of freight charges. Carrier 3, shipper 0.

Just in case the shipper has fallen asleep by this time, the court also awards the carrier prejudgment interest on the past due freight charges.

Yes, the shipper gets a judgment against the broker but so what, the broker has evaporated.

Moral of the story: Carriers rock – just kidding. Get everyone on board through a contract signed by all the parties.

That's it for now. Until next time, keep the cargo *rollin' on!*

### **The Obligatory Disclaimer**

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

### **Short Bio**

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 30 years and emphasizing transportation law, business law and related litigation.