



An Electronic Newsletter for the Transportation Industry

Volume XVIII, Issue 1

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January 2013

Freight Charges, and The Case of the Disappearance of the Primary Responsible Party: Who Pays?

Unpaid carrier. Most everyone has heard of instances where a carrier transports a load, makes delivery, bills the customer and then does not get paid. Sometimes the bill-to party has gone out of business, absconded, filed bankruptcy, or just faded away. Naturally, the carrier, having incurred the expense and fulfilled its responsibility, wants to get paid, and attempts to collect its freight charges from other parties, such as the shipper (where, e.g., the bill-to party is a broker) or the consignee.

Innocent parties. In many instances the shipper has already paid the freight charges to a third party, such as a broker, or the consignee has paid for the product which had the freight charges built into the cost of the product. So it's a situation where someone might end up paying twice, when the music stops. This is most unfortunate since that party is usually innocent of any wrongdoing.

Prederegulation. Back in the good old prederegulation days, it was a pretty good bet that the carrier was going to get paid. The carrier had some ammunition, such as the ICC anti-discrimination regulations, where no favoritism was allowed so of course the carrier had to get paid, and of course the filed rate doctrine, where the written word was asserted as being more important than what was actually agreed to. Those days are behind us, but the case law is still on the books.

Post deregulation. In today's unregulated world, the courts need to

look at the actual factual circumstances, and then apply the law to those circumstances.

Bills of lading. The starting point is to look at the bill of lading. Bills of lading are frequently marked as prepaid, which usually means that the shipper is the bill-to party, and is the party primarily obligated to pay the freight charges.

Parties in peril. So then you get the situation where the shipper pays the freight charges to a third party (e.g. broker) and the broker does not pay the carrier. Who takes the hit, the shipper, the carrier, or the consignee?

The courts frequently rule against the shipper, reasoning that the shipper is in the best position to avoid a double payment situation in the first place, by carefully choosing its agents, and by paying the carrier directly, which may not be practical.

Detrimental reliance. The consignees have an easier path out of double payment, where the demand is made after delivery, by noting that the bill of lading was marked prepaid, and that the consignee accepted delivery in reliance upon this representation by the carrier. After all, had it known before delivery, it could have refused delivery (although other issues come into play). As it is, the consignee would show that it "detrimentally relied" upon the carrier's misrepresentation about payment (or rather lack thereof), and walks free.

Other situations. Problems arise in other situations as well, such as where Section 7 (nonrecourse) is signed by the shipper/consignor, directing the carrier to collect from the

consignee, which precludes the carrier from claiming against the shipper.

Although a notation to bill a third party can be made on the bill of lading, that doesn't preclude the carrier from going after the shipper unless Section 7 is also marked.

Contract/limited recourse. In today's post-regulation world, there is the argument that the parties should be held to their contracts. For example, where a carrier signs a contract with a broker, there is the argument that the carrier's sole recourse should be against the broker. That is the case in most other industries.

Contract/assistance. Shippers can help protect themselves from the double payment scenario by requiring their brokers to insert into their carrier contracts a provision that the carrier agrees to only go after the broker for payment, and that the carrier will not pursue payment of freight charges from the shipper (and consignee). In fact, this provision is commonly found in broker-carrier contracts. It is important that the shipper be provided with a copy of that contract, since in the common situation, the broker is long gone, or otherwise unavailable, when the problem arises.

Conclusion. The discussion above provides a general overview of some nuances involving double payment of freight charges. It barely scratches the surface as there are innumerable fact scenarios which can have an impact on who may get tagged for double payment, or maybe no payment if you are the carrier.

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

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Short Bio

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