

# IT'S ONLY A MATTER OF TIME BEFORE YOU PAY TWICE FOR THE SAME TRUCK LOAD

by Alexis Foster, Gray Reed

“The bedrock rule of carriage cases is that ... the carrier gets paid” ... no matter what. The trucking industry has a powerhouse lobby. In 2018 alone, the trucking lobby spent more than \$11 million promoting this concept and a host of others that have resulted in an inequitable shift in the risk of carrier non-payment. Couple that with the steady deregulation of the trucking industry, which brought about the emergence of freight brokers acting as intermediaries, and the conditions were ripe for the perfect storm.

Premised on the Interstate Commerce Act's requirement that carriers must collect, and shippers, consignors and consignees must pay, all lawful charges duly prescribed by tariff in respect of every shipment, the overwhelming sentiment in carrier non-payment cases is that “the carriers will not be made to suffer hardship any longer for the unpaid fees owed to them.” Plaintiffs' attorneys, smelling blood in the water, have recently filed a record high number of carrier non-payment cases against shippers, consignors and consignees alike. And here's the rub, as long as the carrier itself hasn't been paid, the fact that a freight forwarder has already been paid, is no defense.

Take for example the result in Oak Harbor. In that case, the shipper initially paid more than \$225,000 in freight charges to its freight broker. The broker, however, failed to pay the carrier and went out of business. The court held that the shipper was required to pay the carrier \$225,000 (plus attorneys' fees), even though it had already paid that same amount to its freight broker.

While this defies common sense, courts uniformly espouse that while “it is superficially unfair” that a shipper “must pay for the shipments twice,” “allowing shippers the benefit of carriage without compensating the carrier would eventually cripple the shipping industry, and the economy generally, as carriers devoted their time to investigating potential customers.” Courts instead espouse the theory that shippers are in the better position to avoid liability for double payment on the unrealistic premise that shippers should merely “deal with

reputable freight forwarders”, or “simply pay the carrier directly” instead.

What's more, shippers aren't the only ones on the hook for carrier non-payment. If you are the consignor or consignee, you can still be on the hook for payment of freight if the carrier doesn't get paid. For a consignor, this liability exists regardless of whether it is the owner of the goods and irrespective of the failure of the carrier to collect from the shipper or consignee. And for a consignee, its liability



results from an implied obligation arising from its acceptance of the goods.

Thus, when seeking payment of freight charges, the carrier has three sources from which to seek payment: (1) the shipper or “bill to” third-party, such as a broker; (2) the consignor whose place of business the goods were picked up from; and/or (3) the consignee who received the goods. And remember, this is true even when the intermediary or broker has already been paid and where the consignor or consignee did not negotiate, arrange or agree to pay for freight.

Generally, the bill of lading (“BOL”) determines who is liable to the carrier for non-payment. This is because courts have determined that BOLs are not only receipts, they are the contract for carriage. When the BOL controls, the shipper, consignor and consignee are jointly and severally liable unless one of the two abbreviated notions applies:

– The shipper and consignor are liable unless Section 7 (the “nonrecourse box”) has been

signed by the shipper or the BOL is marked “collect”

– The consignee is liable unless the BOL is marked “prepaid”.

A major concern, however, is that there is no uniform or standard BOL. Every carrier, shipper, freight forwarder and consignor have their own BOL form. If you typically sign a carrier's BOL, training your employees to know exactly where to sign or what to write on a carrier's BOL is an impossible task. This is

especially true for distributors—because while distributors are occasionally shippers, distributors are almost always a consignor or consignee, and a one-size fits all approach will not protect a distributor from paying for freight even though it was never contemplated that they would or being liable for double payment of freight.

How do you protect yourself? The answer depends on whether you are a shipper, consignor, or consignee.

**SHIPPER:** If you negotiated, arranged or agreed to pay for freight and you are using a freight forwarder:

– Research the creditworthiness and reputation of the freight forwarder.

– Sign Section 7/nonrecourse box or mark the BOL “COLLECT”.

– Demand the carrier's name in advance.

– Pay the carrier directly.

– Demand that freight forwarders require carriers to sign a written contract that waives the carrier's right to seek payment from anyone except the freight forwarder.

– Require all freight forwarders and carriers to sign a written contract prohibiting them from double brokering the load and indemnifying you from carrier non-payment.

**CONSIGNOR:** If you are a consignor but did not negotiate, arrange or agree to pay for freight:

– Never sign a carrier's BOL. If you don't have your own BOL form, get one. Your form should include a waiver provision stating

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that the carrier waives any right to seek payment from you for freight.

- Sign Section 7/nonrecourse box or mark the BOL "COLLECT".
- Require the shipper or consignee to pay the carrier directly or demand indemnification prior to permitting the goods to be picked up.
- Require the shipper or consignee to notify you of the carrier it paid, and only permit that carrier to pick up the goods.

CONSIGNEE: If you are a consignee but did not negotiate, arrange or agree to pay for freight:

- Never sign a carrier's BOL. If you don't have your own form BOL, get one. Your form should include a waiver provision stating that the carrier waives any right to seek payment from you for freight.
- Mark the BOL "PREPAID".
- Require the shipper or consignor to pay the carrier directly or demand indemnification prior to accepting delivery of the goods.
- Require the shipper or consignor to notify you of the carrier it paid, and only permit that carrier to deliver the goods.

The bottom line is that, no matter your title, failing to be proactive here will cost you, eventually.

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previously conveyed, it really is a small town" Julie Jewett is a salesperson par excellence. Schooled in hospitality and restaurant management and trained by Disney, Julie sells produce to Dallas area fine dining establishments. "If you ever need a restaurant referral in the Metroplex, call Julie Jewett"

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Charley Jewett: past NASPD President, pipe salesman, gifted storyteller, business man, leader, father and most importantly Rocket.



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