ONCE IS NOT ENOUGH

Shipper Required to Pay Freight Twice says Canadian Court

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In Canada, and no doubt elsewhere, the relationship between shippers, freight forwarders and carriers generally works to the mutual benefit of all. However, in tough economic times, the bankruptcy of a freight forwarder often will leave the carrier and shipper little choice but to litigate a dispute over the freight. The not unusual circumstances involve a situation where the shipper paid the freight forwarder upon being invoiced but the freight forwarder went out of business without having paid the freight to the carrier. In a recent Federal Court of Canada decision the court was faced with just this problem.

An ocean carrier MSC, sought to recover from the defendant shipper, the sum of $65,187 for freight in connection with the carriage of the shipper's goods on three separate occasions. the shipper conceded that the cargoes were theirs and that MSC had carried them to the correct destination in proper condition. However, the shipper denied any liability on the basis that the freight had already been paid to a freight forwarder, that the shipper believed had the authority to receive payment on MSC's behalf.

The Federal Court noted that any result reached in the case would necessarily be viewed as unjust by the losing party, particularly as neither party to the action had done other than what was generally expected. In other words, the carrier had transported the goods as arranged by the freight forwarder, and the shipper had paid the freight forwarder upon being invoiced. The Court was left with the unenviable task of deciding whether the shipper should, in the circumstances, be made to pay twice, or whether the carrier would not be paid at all.

The Federal Court discussed two competing principles in the Canadian case law. The law generally supported carriers in their efforts to collect freight for the carriage of cargo from shippers where a freight forwarder who made the booking goes bankrupt after having been paid

by the shipper. In recent decisions however, the Federal Court has denied recovery to carriers based on equitable considerations. Therefore, the two main issues faced by the Court were:

1. Whether MSC, by its conduct, induced the shipper to conclude that the freight forwarder, was authorized to receive payment for the shipments; and

2. Whether MSC was estopped or prevented from claiming the freight charges because of its knowledge of the forwarder's financial difficulties and its failure to inform the shipper.

The Court heard considerable evidence regarding business practices that are prevalent in the freight forwarding industry. MSC suggested that few shippers were able or willing to devote the resources to keeping abreast of market developments, freight rates and document preparation. As a result MSC's business was primarily conducted with freight forwarders acting on behalf of Canadian shippers. It was MSC's experience that freight forwarders generally insist that carrier representatives not "go behind" the freight forwarder and contact the forwarder's client. Any carrier representative who failed to conform could face serious repercussions, such as loss of future referrals or blacklisting.

The forwarder had contracted with MSC over the years in respect of a number of different shippers. Through the forwarder's marketing efforts, the shipper began using MSC as its maritime carrier in September 2000. MSC agreed to the same credit terms previously negotiated by the forwarder, that is, payment within 30 days from the date of the bill of lading. The forwarder provided a corporate guarantee of the shipper's freight charges and an acknowledgement that it was acting as the shipper's agent. From September 2000 to January 2001, eight transactions took place between MSC and the shipper.

According to MSC, the bills of lading also acted as freight invoices. The shipper's name was inserted on all bills of lading as the shipper and, in accordance with the bill of lading terms, as the party responsible for the freight. Even though the bills of lading were addressed to the shipper, they were delivered to the forwarder, as custom dictated.

The forwarder was late in making the freight payments to MSC beginning with the first shipment. MSC gave evidence that although there was some tolerance shown towards freight

forwarders once the 30 day credit period expired, MSC never willingly agreed to receive payments late from the forwarder and the company's leniency did not constitute an extension of credit.

MSC invoiced the shipper for the total amount of $65,187 for freight earned on three voyages in November and December 2000. Through January and February 2001 MSC insisted on payment in conversations with the forwarder and advised that two new bookings would not be released without payment in advance. The witness for MSC testified that he had no reason to suspect that the cause of the forwarder's non-payment was something other than the lack of receipt of funds from the shipper although there was an acknowledgement that MSC was aware that the forwarder was having cash flow problems.

Ultimately MSC advised the forwarder that it would have to contact the shipper directly. The forwarder responded immediately requesting MSC not to communicate with the shipper as it would alienate the shipper and could put the forwarder out of business. When finally MSC contacted the shipper directly as to why the forwarder was not paying the shipper's invoices, MSC was advised that the forwarder had already received payment. The shipper's terms with the forwarder were payment within seven days of billing.

The Federal Court considered the foregoing circumstances and noted that there is a trend in the Federal Court of Canada to avoid imposing on an innocent party an obligation to pay a second time under equitable principles. In *Morlines Maritime Agency v. Iko Industries* the plaintiff agent of a carrier sought recovery of freight from a defendant shipper in circumstances where the shipper had already paid its freight forwarder who had gone bankrupt before paying the carrier's agent. The court held that the shipper did not have to pay the freight to the carrier noting that the carrier agent's conduct had led the shipper to conclude that payment should be made directly to the forwarder as carrier. Therefore, determining whether a payment of freight by the shipper to the freight forwarder is to be considered payment to the carrier can only be answered by delving into the intention of the parties by reviewing the documents and the party's conduct.

In another Federal Court decision in *CP Ships v. Les Industres Lyon*, the Court stated that where a shipper instead of paying the carrier, chooses to pay a freight forwarder, the shipper does so at

his peril. Where the money is not turned over to the carrier, the shipper then has the onus to establish either:

1. That the carrier actually authorized the freight forwarder to receive the money, or

2. That the carrier held the freight forwarder out as being so authorized, or

3. That the carrier by his conduct induced the shipper to come to that conclusion, or

4. That a custom exists so that both the shipper and the carrier would normally expect payment to be made to the freight forwarder.

In the instant case, the Court considered the above principles and observed that since freight forwarders may have few assets, and yet book cargo far exceeding their net worth, there is no economically rational motive for the carrier to release the shipper. It follows that carriers would expect payment to come from the shipper, albeit passing through, and not from, the freight forwarder. The Court then concluded that there are legitimate policy reasons for adopting a rebuttable presumption in favour of shipper liability.

The Court held that the burden was on the shipper, not MSC, to prove that its liability was released. The shipper did not call evidence to establish that it was somehow induced to believe that MSC was not looking to the shipper for payment. The Court also found that MSC was under no obligation to approach the shipper directly when concerns arose about late payments from the forwarder, particularly in light of the practice in the industry of not "going behind" a forwarder. Since the shipper appointed the forwarder as its agent for purposes of billing and collecting freight charges, and as the party to whom all documents necessary for that purpose would be sent, MSC could not be faulted with following the trade practice of dealing with the shipper solely through its agent. Therefore under the general principles of agency and by operation of law, the Court concluded that non-payment by an agent is deemed non-payment by the principal and the shipper had simply failed to take proper precautions to protect itself.

The trial judge observed that the shipper could have investigated the reputation of its freight forwarder. It could also have insisted that the cheques be payable to the carrier, and not the freight forwarder. In the result, the Federal Court of Canada held that the shipper remained

liable to the carrier, MSC, on the basis that it was unable to present clear evidence that the carrier somehow released it from liability. The shipper was therefore required to pay the freight a second time.

In conclusion, shippers will continue, for economic and logistical reasons, to carry out the business of shipping cargo through the use of intermediary companies such as freight forwarders whose business is to keep on top of market developments, rates and the preparation of documentation. However care must be taken in the choice of freight forwarders. It is a prudent shipper that conducts a due diligence investigation of the forwarder's reputation in the community.

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