



# Who pays the freight?

## The shipper may not always be liable

“A shipper is primarily liable to pay freight charges on goods shipped, whether or not it is the owner of the goods, and even where there is an express term in the bill of lading that the consignee is liable for the freight.”

Applying this well-established general legal principle, Canadian, American and English courts have held shippers liable for freight charges in a remarkably wide variety of circumstances. But is the shipper’s liability to pay freight charges absolute? Can the shipper escape liability and, if so, how?

The rationale for the general principle was expressed by the Ontario Court of Appeal, which cited a leading American case:

“Ordinarily the person from whom the goods are received for shipment assumes the obligation to pay freight charges; and his obligation is ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability upon the consignee. For the shipper is presumably the consignor; the transportation ordered by him is presumably on his own behalf; and a promise by him to pay therefore is inferred (that is, implied in fact), as a promise to pay for the goods is implied, when one orders them from a dealer.”

### Application of the rule

In a recent decision, a US court held shipper Sears Roebuck and Co and a freight broker, National Logistics, jointly and severally liable to pay almost half a million dollars for freight charges to a carrier, Oak Harbor Freight Lines (so named on the bills of lading). When National Logistics failed to pay Oak Harbor’s outstanding freight bills in excess of US\$400,000, the carrier claimed payment from Sears Roebuck and Co, the shipper of the goods.

Sears claimed that it was not liable, and argued that since it already paid more than US\$200,000 for freight charges to National Logistics, it should not bear the risk of non-payment of the freight charges to the motor carrier.

The Court of Appeals rejected that argument and held that Sears was liable to pay the freight charges to the carrier because “a shipper should bear the risk when it chooses to pay for the freight charges through a broker rather than directly to the carrier”.

It gets worse. Numerous courts have also concluded that the primary liability of the shipper for freight charges remains, even where freight moves on a collect basis and the carrier bills—but fails to receive payment from—the consignee pursuant to a collect designation, or extends credit to the consignee instead of claiming a lien on the shipped goods to secure payment.

### The good news

The good news is that the shipper’s liability to pay freight charges is not absolute. Relief may be found, and the shipper can escape liability in certain circumstances, several of which are examined below.

Whether the shipper is liable for freight charges depends on the contract made between the parties. Liability at common law for freight rests on the person who contracts with or employs the carrier. The person from whom the carrier ordinarily receives the goods is the person who employs the carrier and the one who is therefore liable to pay the freight charges.

As one judge succinctly stated:

“In the absence of clearly expressed contractual terms, liability for payment of carriage charges is not determined by the particular description of any party to the transaction, that is, whether it is as consignor, consignee, shipper, buyer, owner, etc, but by answering the question—‘who employed the carrier?’”

Thus, where a person selling goods is named in a bill of lading as a shipper, and is in fact not the shipper, that is, the person who engaged the carrier, the person identified as a shipper will not be liable to the carrier for freight charges. His involvement in the transaction does not, without more, make him a party to the contract of carriage, and liable as a shipper.

At times, a bill of lading may be used by a party named therein as a shipper, as a receipt, or a document showing title to the goods shipped, and not as a document making the shipper a party to the contract of carriage.

The shipper’s liability for payment of freight charges may be relieved where the carrier has agreed to look only to the consignee (or another party), and not to the shipper, for payment. The Nova Scotia Court of Appeal expressed this principle as follows:

“In the absence of some agreement to the contrary to which the plaintiff was a party, the plaintiff is entitled to look for his pay to the person who employed him to do the work. To escape such liability, the consignor must show that there was an agreement of some kind by which the carrier agreed to look only to the consignee for payment.”

This type of agreement may be made orally, in writing, by conduct, or by a combination thereof, with the legal effect of relieving the shipper from liability to pay for the freight.

However, the agreement must clearly and unequivocally show that the carrier agreed to look only to the consignee (or another party) for payment of the freight charges. If this can be established, the shipper will escape liability.

The shipper can be relieved of its general liability to pay the freight charges by including in the contract of carriage a term and condition that the carrier not deliver the goods until paid by the consignee. If the carrier does not comply

with this contractual term, and fails to receive payment from the consignee prior to the delivery of the goods, the shipper's liability is discharged, and the carrier must look only to the consignee for payment of the freight charges.

If, instead of paying the freight directly to the carrier, the shipper pays it to a freight broker (or other third party), who then fails to pay the carrier, the shipper may escape liability for the outstanding freight charges if it can prove that:

The carrier authorized the freight broker (or other third party) to receive payment on its behalf;

The carrier held out the freight broker (or other third party) as being authorized by the carrier to receive payment;

The carrier by its words or conduct induced the shipper to believe that the freight broker (or other third party) was authorized by the carrier to receive payment; or

A custom of trade existed in the circumstances by which the carrier and the shipper reasonably expected payment of the freight charges to be made to the freight broker (or other third party).

### Miscellaneous escape routes

Courts have also relieved shippers of liability to pay freight charges by relying on various principles of law and equity. Whether the shipper may be entitled to benefit from these principles and legal precedents depends on the facts and evidence in each particular case.

### Final arguments

There is good and bad news for the shipper. The bad news is that the shipper is primarily liable for freight charges based on the general presumption that, in the absence of evidence to the contrary, the contract of carriage is made with the person who delivers the goods to the carrier and that person who contracts with the carrier is liable to pay for the freight.

The good news is that there are circumstances in which the shipper is relieved or discharged of its liability to pay freight charges. That the shipper's liability to pay freight charges is not absolute should provide some comfort to shippers who can take heart in the knowledge that they may be able to escape liability when a disagreement occurs.

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