Carrier Brokers Gone Broke: Who Should Pay the Broker's Carrier-Subcontractor Services?

Kimberly Martinez*

I. Introduction

A bill of lading is evidence of a valid contract of carriage that contains presumptions of liability between a shipper and carrier.[1] The Supreme Court of the United States has held that shippers and carriers may contract around the presumptions by allocating who shall pay the freight charges and to whom.[2] For instance, a shipper may enter into a motor

* Ms. Kimberly Martinez graduated *Magna Cum Laude* from the Metropolitan State College of Denver in 2001 with a B.S. and will receive her J.D. from the University of Denver Sturm College of Law in May of 2008. Ms. Martinez served as Assistant Staff Editor for the Transportation Law Journal during the 2008 spring semester. Ms. Martinez thankfully acknowledges Ms. Teresa Bruce for her mentorship in developing Ms. Martinez's writing skills.

1. S. Freight, Inc. v. LG Elec., U.S.A., Inc., No. 05-A-13469-3 [2005-2007 Fed. Carr. Cases] Fed. Carr. Rep. (CCH) ¶ 84,500, at 59,474 (Ga. Super Ct. June 8, 2007) (citing S. Pacific Transp. Co. v. Commercial Metals Co., 456 U.S. 336 (1982)).

2. *See* J & P Trucking, Inc. v. USA Motor Express, Inc. (*In re USA Motor Express, Inc.*), No. 06-J-4875, slip op. at 4 (D. Ala. Oct. 18, 2007) (citing Louisville & Nashville R.R. v. Central Iron & Coal Co., 265 U.S. 59 (1924)).

carrier contract under which the carrier may subcontract with another motor carrier to haul the shipper's freight. The issue then becomes whether the shipper is liable to the carrier-subcontractor under the shipper's motor carrier agreement.

II. Background

The facts of each case determine whether a carrier-subcontractor can successfully bring a lawsuit for payment against the shipper when the primary carrier fails to pay the carrier-subcontractor. The two cases illustrating this point are *J & P Trucking, Inc. v. USA Motor Express, Inc. (In re USA Motor Express, Inc.)*[3] and *Southern Freight, Inc. v. LG Electronics U.S.A., Inc.*[4] The court in both cases examined the law of the transportation industry regarding the dealings between shippers, first-carriers, and second-carriers. Although the respective courts decided the same issue, the cases resulted in different outcomes. The court in *USA Motor Express* held that the shipper is not responsible for paying the amount charged by the carrier-subcontractor for hauling the shipper's loads when the carrier-broker failed to pay.[5] In contrast, the court in *Southern Freight* held that the secondary carrier could independently seek recovery against the shipper under the presumption of shipper liability.[6] The distinguishable factors between the two cases turn on contractual relationships between the parties in light of the bill of lading.

III. Contractual Obligations Trump Presumptions of Consignor's Liability

Bills of lading serve as a transportation contract between the shipper and carrier.[7] The terms and conditions of bills of lading have the force and effect of a statute.[8] They presumptively afford carriers the right to collect directly from the shipper.[9]Although a bill of lading contains liability presumptions, shippers and carriers may contract around them[10] and

3. *Id.* at *2.

4. *S. Freight*, No. 05-A-13469-3 [2005-2007 Fed. Carr. Cases] Fed. Carr. Rep. (CCH) ¶ 84,500 at 59,472.

5. *See USA Motor Express*, No. 06-J-4875, slip. op. at 6 (holding plaintiffs right of action is against broker-carrier, not shipper).

6. *S. Freight*, No. 05-A-13469-3 [2005-2007 Fed. Carr. Cases] Fed. Carr. Rep. (CCH) ¶ 84,500 at 59,474.

7. *Id.*

8. *Id.*

9. *See USA Motor Express*, No. 06-J-4875, slip. op. at 4; *S. Freight*, No. 05-A-13469-3 [2005-2007 Fed. Carr. Cases] Fed. Carr. Rep. (CCH) ¶ 84,500 at 59,474.

10. *See USA Motor Express*, No. 06-J-4875, slip. op. at 4; *see also S. Freight*, No. 05-A-13469-3 [2005-2007 Fed. Carr. Cases] Fed. Carr. Rep. (CCH) ¶ 84,500 at 59,474 (discussing express waivers by the shipper pursuant to Section 7 non-recourse provision).

default terms only apply if the parties fail to agree on the contractual terms.[11] Moreover, a shipper is presumably the consignor whose transportation of goods infers a promise to pay the party hauling its goods.[12] The inference is rebuttable if the bill of lading indicates that consignor-shippers did not act on their own behalf.[13] Thus, shipper-consignors are typically responsible for shipping charges because the one who ships the goods assumes the obligation to pay the freight charges unless an independent contract provision evidences otherwise.

Issues of shipper liability typically result when a transportation contract permits a carrier to subcontract with another carrier for the transportation of the shipper's goods. Transportation contracts may allow a carrier to subcontract with another carrier to carry out the transportation of the shipper's goods. Accordingly, a shipper-consignor may rebut the liability presumption embedded in bills of lading by providing evidence that the parties contracted around such presumption.[14] Nonetheless, courts are unlikely to hold shipper-consignor liable to pay freight charges to a subcontracted carrier when: (1) the court finds that the principal-carrier failed to disclose it acted as an agent for the carrier-subcontractor pursuant to a broker agreement;[15] (2) shippers expressly waive their liability by executing a non-recourse provision;[16] or (3) separate hold harmless contract provision.[17]

In *USA Motor Express*, the Alabama District Court discussed the liability, if any, of a shipper to pay for a motor carrier-subcontractor's services when the broker-carrier fails to pay the carrier-subcontractor prior to filing bankruptcy even though the shipper paid the broker-carrier.[18] In other words, the court looked at whether carrier subcontractors who transported goods for a shipper pursuant to a separate broker agreement may seek payment from the shipper for the broker-carrier's failure to satisfy its payment obligations when the shipper is not a party to the broker agreement. The decision of this court turned on the shipper's agreement with the broker-carrier.

The pertinent facts of *USA Motor Express* are as follows. On November 21, 2005, the plaintiffs, J & P Trucking Company and Nassbaum Trucking, Inc. ("Plaintiffs"), filed a declaratory judgment action against USA Motor Express, Inc. ("USA"), LG Electronics USA, Inc. ("LG"),

11. *USA Motor Express*, No. 06-J-4875, slip. op. at 4.
12. *See id.*
13. *Id.*
14. *Id.*
15. *See id.* at *4-5.
16. *S. Freight*, No. 05-A-13469-3 [2005-2007 Fed. Carr. Cases] Fed. Carr. Rep. (CCH) ¶ 84,500 at 59,474.
17. *See USA Motor Express*, No. 06-J-4875, slip op. at 3.
18. *See id.*

and other defendants.[19] Plaintiffs sought declaration of their rights and legal relationship with the named defendants.[20] Specifically, the plaintiffs argued that LG should pay for their transportation of goods because USA never paid them for hauling LG's goods. Prior to Plaintiffs' declaratory action, USA filed a petition for bankruptcy with the United States Bankruptcy Court for the Northern District of Alabama.[21] Therefore, the court dismissed USA from the lawsuit because USA's filing of the bankruptcy petition stayed the proceedings pursuant to the United Sates Bankruptcy Code.[22]

The facts leading up to the case stem from two independent contracts between the parties. The defendant, LG contracted with USA to haul its goods ("Motor Carrier Agreement"). The pertinent parts of the Motor Carrier Agreement permitted USA, as carrier, to "[S]ubcontract with other motor carriers . . . to perform the transportation services under the agreement."[23] Further, LG, as shipper, promised to pay USA for the freight charges provided USA hold LG harmless against all other demands and suits by carriers seeking duplicate payments or other charges.[24] Thus, USA entered into an agreement with Plaintiffs to haul LG's load pursuant to a Transportation Brokerage Contract.[25]

Plaintiffs entered into a Transportation Brokerage Contract as independent contractors. USA, as broker, promised to pay Plaintiffs for the freight charges upon receipt of each Plaintiffs freight bill, bill of lading, and delivery receipt.[26] Additionally, each Plaintiff retained USA as their broker for purposes of soliciting merchandise for transportation and for accepting payment for the transportation of goods.[27] The agreement further authorized USA to act as their agent to invoice shipper or consignor for non-payment of freight charges.

LG paid USA for transporting its goods.[28] USA then paid Plaintiffs generally within the specified time set forth in their Transportation Brokerage Contracts.[29] However, Plaintiffs stopped receiving payment from USA prior to it filing bankruptcy even though LG paid it for the hauling of goods.[30] Further, Plaintiff, J & P, asserted that LG continued to pay

19. *Id.* at *1.
20. *Id.* (discussing plaintiffs declaratory relief pursuant to 28 U.S.C. § 2201).
21. *Id.*
22. *Id.* at *1 n.3
23. *Id.* at *3.
24. *Id.*
25. *Id.* at *1, 3.
26. *Id.* at *3.
27. *Id.*
28. *Id.* at *1
29. *Id.*
30. *Id.*

USA after it terminated USA as its agent.[31] Based on the above, Plaintiffs are not likely to receive payments for hauling LG's load because USA filed bankruptcy and is the most likely reason why Plaintiffs claim that LG owes them for the shipments.

Plaintiffs did not dispute that LG paid for the transportation of its goods. Rather, Plaintiffs argued that LG should pay them again because they are not bound to the terms of the Motor Carrier Agreement.[32] Conversely, LG argued that it does not owe Plaintiffs for the shipments because it already paid USA pursuant their contract and it is not in contractual privity with Plaintiffs. In response, Plaintiffs counter argued that LG remained liable – pursuant to the bills of lading – to Plaintiffs for shipping charges, irrespective of its payment to bankrupt USA. The court, however, disagreed.[33]

The *USA Motor Express* court found after examining all relevant contracts that the broker-carrier acted as an agent for the carrier-subcontractors, holding the shipper had no liability to pay the carrier-subcontractors even though the broker-carrier failed to pay.[34] The court reasoned that the parties' independent contracts clearly evidenced that LG agreed to pay USA for the transportation of its goods and USA agreed to pay Plaintiffs, as motor carrier-subcontractors for its freight.[35] Further, the court pointed out that USA expressly held LG harmless against all claims seeking duplicate payments.[36] Therefore, Plaintiffs could not seek independent relief against LG for USA's failure to satisfy its payment obligations under the Transportation Broker Contract.

Prior to the *USA Motor Express* decision, the Superior Court of Georgia decided the issue differently based on a case with similar facts. In *Southern Freight*, the Superior Court of Georgia placed a higher importance on the shipper's bills of lading rather than on the parties' independent contracts. As a result, the *Southern Freight* decision had a different outcome than the *USA Motor Express* decision. The carrier-subcontractor, Southern Freight, tried collecting its unpaid freight charges from the consignor-shipper, LG Electronics, U.S.A., Inc. ("LGE"), after the broker-carrier, USA Motor Express, Inc. ("USAM"), failed to satisfy its payment obligations.[37]

The *Southern Freight* court, like the *USA Motor Express* court, eval-

31. *Id.* at *1, 5.
32. *Id.* at *3.
33. *Id.*
34. *See id.* at 5.
35. *See id.* at *4.
36. *Id.*
37. *S. Freight*, No. 05-A-13469-3 [2005-2007 Fed. Carr. Cases] Fed. Carr. Rep. (CCH) ¶ 84,500 at 59,472.

uated the contractual relationships between LGE and USAM, and Southern Freight and USAM. LGE entered into a transportation contract ("Transportation Contract") with USAM for the transportation of its goods.[38] The parties moved the shipments pursuant to bills of lading issued by LGE.[39] USAM then contracted with Southern Freight for the delivery of LGE's goods. Pursuant to their agreement, Southern Freight billed USAM, including the transportation of LGE's freight.[40] LGE's bills of lading ultimately governed the pickup process and deliveries.[41]

Each bill of lading had USAM as the designated carrier and defined carrier as "[A]ny person or corporation in possession of the property under this contract."[42] Nonetheless, Southern Freight also placed its name on each bill of lading.[43] The bills of lading also contained a Section 7 non-recourse provision. LGE signed this section in only two out of sixty-nine bills of lading.[44] In addition, LGE and USAM voided the terms and conditions in all bills of lading without Southern Freight's knowledge.[45] LGE paid USAM and USAM paid the second carrier.[46] At no time did LGE and Southern Freight have a contract or enter into a contract.[47]

Southern Freight started billing LGE after USAM failed to satisfy payment for the hauling of LGE's load even though LGE had no knowledge of Southern Freight let alone its transportation rates for the loads of cargo.[48] Subsequently, USAM filed bankruptcy. As a result, Southern Freight commenced a lawsuit against LGE in efforts to collect the unpaid freight charges.[49] The *Southern Freight* court reviewed the independent contracts and found no written contracts between LGE and Southern Freight. Nonetheless, the court held LGE liable for amounts due to Southern Freight.[50] The court reasoned that the bills of lading created a contract between LGE and Southern Freight, and the contract between Southern Freight and USAM "[did not] bar plaintiff Southern Freight from independently seeking recovery against LGE, as the shipper."[51]

The *USA Motor Express* decision emphasized the importance of con-

38. *Id.* at 59,473.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 59,743-44.
46. *Id.* at 59,743.
47. *See id.*
48. *Id.* at 59,744.
49. *Id.* at 59,742.
50. *Id.* at 59,475.
51. *Id.*

tract law unlike the *Southern Freight* decision. A court in reviewing the terms of a contract must give effect to the plain meaning of the contractual terms and presume that the parties intended all clearly stated terms.[52] The court should enforce the contract unless it is ambiguous.[53] A contract is unambiguous if the court finds that there is only one reasonable meaning. The court may in determining if the contract is a final expression of obligations, consider trade usage, course of dealing, and course of performance.[54]

Again, in *USA Motor Express* the court gave full weight to the contract between LG and USA and the contract between Plaintiffs and USA, concluding both clearly reflect the full intentions of each respective party.[55] The court pointed out that Plaintiffs knew they entered into a contract with USA solely to arrange shipment of loads, USA paid them for hauling these loads, and they expected payment solely from USA regardless if the shipper paid for such services.[56]

Moreover the *USA Motor Express* court conceded that Plaintiffs were correct that LG, consignor, is liable for shipping charges provided there are no other contracts and the parties signed section 7 of the recourse provision.[57] The court rejected Plaintiffs argument, finding the two separate contracts contradicted Plaintiffs' argument. LG entered into a carrier contract with USA under which it promised to pay for the freight charges.[58] Further, USA executed a hold harmless provision protecting LG against all other demands and suits by carriers seeking duplicate payments or other charges.[59] Given these facts, the court concluded that the evidence failed to reveal that LG knew that USA further consigned the load with another carrier for purposes of shipping LG's load and LG properly waived its liability to LG and subsequent carrier-subcontractors; thus, it could not be held liable.[60] The court reasoned that to hold LG liable would effectively disregard both contracts of the parties, which the court is not at liberty to do.[61]

The court bolstered its reasoning by pointing out that the contract between USA and LG clearly stated that the parties' intended that LG would pay USA for shipment even if USA subcontracted the hauling of

52. *See USA Motor Express*, No. 06-J-4875, slip op. at 5.
53. *Id.*
54. *Id.*
55. *See id.*
56. *See id.*
57. *Id.* at *4.
58. *Id.*
59. *Id.* at *4-5.
60. *See id.* at *5.
61. *See id.*

the loads.[62] In fact, Plaintiffs expressly shows that they retained USA as their agent with complete "authority to act in carrier's behalf for the sole purpose of securing merchandize and collecting payment for transportation."[63] Although sympathetic to Plaintiffs position, the court stated that all parties were bound to contracts they willingly and knowingly entered.[64] Therefore, the court refused to redraft the parties' respective contracts to include unforeseeable events such as USA payment default.

In contrast, the *Southern Freight* decision turned on the fact that the contract between LGE and USAM failed to limit the shipper's liability for USAM's failure to pay Southern Freight. The *Southern Freight* court also found that the bills of lading constituted a contract between LGE and Southern Freight.[65] The court then held that Southern Freight has a contractual right to expect payment pursuant to LGE's bills of lading.[66] Stated differently, LGE, as shipper, failed to take the necessary precautions to secure its release from double payment because it failed to sign the non-recourse provision and did not have a hold harmless provision in its contract with USAM.[67] Nor did Southern Freight know that LGE and USAM agreed to void the terms and conditions of bills of lading.[68] Therefore, the court ultimately allowed Southern Freight to seek payment against LGE, reasoning LGE's contract with USAM failed to exclude the presumption of shipper liability.

IV. Conclusion

USA Motor Express emphasized the importance of contract law when determining the liability of each respective party. While the *USA Motor Express* decision refused to place any payment liability on the shipper despite the fact Plaintiffs' loss is uncollectible against bankrupt USA, it does insinuate a different conclusion had LG *known* USA acted as an agent for Plaintiffs by focusing on the fact LG did not know USA consigned LG's load under a separate contact. Further, the court emphasized the importance of the contracts of each party. *Southern Freight* emphasized quite the opposite. This case focused on the importance of the terms and conditions of bills of lading. The court seemed more willing to impose the shipper liability presumptions regardless of the independent contracts between the parties by finding bills of lading constituted con-

62. *See id.*
63. *Id.*
64. *See id.* at 6.
65. *S. Freight*, No. 05-A-13469-3 [2005-2007 Fed. Carr. Cases] Fed. Carr. Rep. (CCH) ¶ 84,500 at 59,472.
66. *See id.* at 59,472, 59,475.
67. *See id.* at 59,475.
68. *Id.*

tracts between the carrier-subcontractor and the shipper-consignor. This is true even though neither party knew about their respective independent contracts with the carrier-broker.

Both cases, however, are not without similarities. Each case cited to other court decisions emphasizing the importance that shippers properly waive their rights by: (1) executing section 7 non-recourse provisions located in bills of lading;[69] or (2) executing an independent contract shifting the shipper's presumptive liability.[70] Further, the cases illustrate the important social policies involved where broker-carriers file bankruptcy while leaving carrier-subcontractors without the ability to collect payment. *USA Motor Express* seemed unwilling to open the door for the possibility that carrier-subcontractors would receive double payment whereas *Southern Freight* emphasized the presumptive right of carriers to collect directly from the shipper absent any express waiver by the shipper even if the result is double payment.[71]

For several reasons, the *Southern Freight* decision has better social implications. The better policy is to ensure that carrier-subcontractors receive payment for their services, even if doing so results in double payment. Firstly, the likelihood of carrier-subcontractors receiving double payment is slim where they become unsecured creditors in bankruptcy filings by broker-carriers. Secondly, Shippers should know that when they permit carriers to subcontract with another carrier for purposes of hauling the shippers' goods, it is possible it will have to pay the carrier-subcontractor if the carrier-broker fails to satisfy its payment obligations. This is especially true under *Southern Freight* that found the shipper's bills of lading evidenced a contract between the carrier and shipper. Finally, shippers know of the presumptions imposed in bills of lading despite whether they know about broker-carriers' independent subcontracts; and that courts presumptively hold shippers liable to the carrier without an express contract provision releasing them from such liability.

In sum, courts should be more willing to hold all parties liable to each other under the reasoning in *Southern Freight*. Social concerns also suggest that courts should protect the carrier-subcontractor from assuming the economic burden when the law permits shippers to expressly contract around their presumptive liability. The contrast between *USA Motor Express* and *Southern Freight* further shows the need for predictability. Therefore, future litigation of the issue is likely to continue, and will become especially pertinent in the face of bankruptcy proceedings.

69. *See id.* at 59,474-75.

70. *See USA Motor Express*, No. 06-J-4875, slip op. at 5.

71. *S. Freight*, No. 05-A-13469-3 [2005-2007 Fed. Carr. Cases] Fed. Carr. Rep. (CCH) ¶ 84,500 at 59,474.