

DAMAGE CLAIMS

How to process a damage claim

FREIGHT INSURANCE COMPANIES, LOGISTICS SERVICES & FREIGHT CARRIERS:

It is important to understand the responsibilities of your freight insurance company, the logistics service and the freight carrier. (The company that actually transported your shipment)

Please see “Court Ruling” below for specifics.



THE FREIGHT INSURANCE COMPANY

A freight insurance company provides freight insurance during transit. Freight insurance is not purchased from American Freight Companies (a logistics service) and not purchased from the freight company (carrier) that transported your freight.

If you did secure freight insurance, you would have arranged for it with your insurance company (Home owners or business), or you may have contacted an insurance company that specializes in freight insurance. A list of freight insurance companies is available at www.freightinsurancecompanies.com as well as the yellow pages. If you have experienced loss or damage, you should contact your freight insurance company directly. It is recommended that this be done within 24 hours of delivery.



THE LOGISTICS COMPANY:

The American Freight Company is a logistics service and freight brokerage. As such, our function is to provide access to major freight carriers. In many respects our relationship is very similar to a travel agency, we help you find a carrier, but we are not the actual carrier. We never see nor handle your shipment. Your freight carrier is the company that did the actual pickup, transportation and deliver of your shipment.



THE FREIGHT CARRIER:

The freight company that actual transported your shipment is exclusively responsible for the transportation and delivery of your shipment. (See documentation provided at time of shipping)



REGULATIONS:

You should also be aware that your freight carrier (all freight carriers) are subject to the applicable rules and regulations governing freight at the federal, state, and local levels. On issues of damage claims and damage liability, the National Motor Freight Association (NMFC) establishes the rules and regulations.



FREIGHT CARRIER LIABILITY:

Do not confuse "carrier liability" with "freight insurance". As explained below, the freight carriers liability is based on a rate of 10 cents per pound, not the value of what you shipped.

Freight carriers in the United States are liable for lost or damaged freight, based on a rate per pound. While the carriers liability may provide some recuperation, it is strictly limited to the rate per pound.

Carrier liability is calculated as follows:

$$(\text{Weight Of Shipment} \times 10 \text{ cents Per Pound} = \text{Carriers Total Liability})$$

Many shippers purchase additional freight insurance. If you did purchase freight insurance, it would have been through a Freight Insurance Company (3rd party) not from American Freight Companies and not from the freight carrier.

If such insurance was purchased, you should contact that insurance company as soon as possible. If you did not purchase additional freight insurance coverage, your carrier's (for that matter, all US freight carriers) liability is .10 per pound. This amount can not exceed the invoice value of the shipment.



SHIPPERS (YOUR) RESPONSIBILITIES:

You must provide all supporting documentation as requested in the form below. Missing documentation and or signatures will result in a delay of processing your claim.

The following is a copy of the agreement included in your original documentation.

Your rates are based on: the type of item(s) being shipped (class), weight, size, commercial or residential pickup or delivery. Shipper is responsible for correct shipment description & commodity code. Should the actual shipment's description or services prove to be different than shown, additional charges may be assessed and charged to your account. As the shipper, you agree to pay for the actual weight, actual dimension(s) and actual services provided. For shipments requiring special services, AFC will offer to arrange transport by appropriate alternative carrier(s) Charges will be based on actual services as required with full credit applied. Shipper may request cancellation at any time up to 30 days after contract date. If the shipper elects to cancel the service, a 20% cancellation and processing fee will be applied. The carrier(s) is subject to all state & federal laws & regulations applicable to the transportation of this shipment and is therefore exclusively liable for the shipment. **The shipper understands that the American Freight Companies (AFC) is not the actual carrier and as such, the shipper will not deny AFC payment for reasons related to disputes with the carrier. Shipper agrees the laws and regulations of United States of America and the State of Florida have sole jurisdiction regarding the execution of this agreement and that the venue for all legal proceedings concerning this invoice and associated services shall be in Pinellas County, Florida.**

Shipments are covered under the carrier's limited liability coverage, per the carrier's tariff schedule at \$0.10 per pound. Shipper may secure ancillary liability coverage via third party at

www.freightinsurancecompanies.com. Consignee agrees to inspect the shipment at the time of delivery & document any damage on the delivery bill. Shipper is responsible for proper preparation, packing, and addressing of the shipment. Shipper must provide shipping forms (BOL) at the point of pickup or a \$45.00 reprocessing fee may be accessed. As the party arranging this shipment you are agreeing to pay for all services as actually provided. As the party arranging this shipment, you are agreeing to pay for all services as actually provided.

As the party arranging this shipment you are agreeing to pay for all services as actually provided

DATE OF SHIPMENT

SIGNATURE OF CARDHOLDER

DATE



HOW TO REPORT CLAIMS:

Basic steps for claims processing:

- ▶ Record damage on delivery document and have the driver sign (Very Important)
- ▶ Fill out damage claim forms online, print and hold copy (within 48 hours)
- ▶ You will be contacted by a representative of American Freight Companies, The representative will assist you in preparing your claim. American Freight Companies will also contact the carrier for you.
- ▶ Provide copy of supporting documentation (pictures, invoices etc) to American Freight Companies.
- ▶ After you have provide American Freight Companies with the above documentation, a freight inspector will be sent out to investigate the claim.
- ▶ Provide inspector with proof of value (invoice required).
- ▶ Give inspector a copy of your delivery receipt showing noted damage (signed by driver).
- ▶ The carrier will process your claim.

Processing a damage claim can take 3 to 4 weeks. Be sure to check with your carrier if you have not heard anything within that time.

Customer Services Department

Federal Court Rulings

The High Court has determined that Freight Logistics Services, Freight brokers & Freight Forwarders are Not Responsible As Agent.

The American Freight Company is a freight logistics service. As such we act as a freight broker or freight forwarder. In this capacity, we never handle or for that matter even see the freight that is transported by the actual freight carriers.

At the time the shipment is arranged, the shipper signs an acknowledgment That:

1) They agree to hold the American Freight Company harmless 2) They agree to a State of Florida venue for all legal proceedings 3) They acknowledges that the Actual Carrier's liability shall be no greater than 10 cents per pound.

Court Rulings "The Travel Agent Mode"

Los Angeles - 30 August -- A federal appeals court ruling on Aug. 24 2000 that just because a forwarder or freight broker promises close door-to-door care & supervision of a shipment doesn't mean it's liable when the cargo is damaged en route. The 2nd U.S. Circuit Court of Appeals in New York reversed a lower-court ruling against forwarder Panalpina, which arranged a shipment of an electrical transformer from Italy to Iowa.

The transformer broke loose from the flat rack on which it was stowed, & damaged other cargo belonging to Prima (U.S.A.) Inc. After Prima sued, the lower court said Panalpina was liable because it had stated to Westinghouse: "Rest assured your shipment will receive door to door our close care & supervision."

The appeals court quite properly said Panalpina was not liable, because it acted as a forwarder instead of a carrier (NVOCC), & because it exercised "reasonable care" in selection of the stevedore & carrier. The appeals court said: "There is a well-settled legal distinction between forwarders & carriers

The case was defended by leading Int'l transport underwriter XL Specialty Insurance Company & argued to the high court by our dear friend -- the great transport lawyer Andrew Spector, Esq. of the MIA firm of Hyman & Kaplan.

This case reconfirms a 1949 proposition of the U.S. Supreme Court (See *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Acme Fast Freight, Inc.*, 336 U.S. 465, 467-68, 93 L. Ed. 817, 69 S. Ct. 692 (1949) that a forwarder, arranging transport via carrier and identifying themselves as not the carrier is just an agent, with no responsibility for the physical state of the cargo.

In its opinion the high court quite properly defined a non-carrier freight forwarder as a "travel agent" for freight.

The public commonly accepts the imperative that a "travel agent" who books your passenger flight is not responsible for your lost luggage. The federal court now restates the old, but sometimes forgotten, rule that this same basic principle applies to cargo.

This same standard applies, as a matter of basic transport definition to the acts of Customs Brokers in their arranging for cargo disposition after Entry. Once the Customs Broker knows when Entry will be granted, a Delivery Order ("D.O.") is issued. The D.O. notifies the next carrier as to cargo availability & location of the cargo from custody of the present carrier. The D.O. is just a notice, not a bill of lading. The Customs Broker has merely made arrangements as a "travel agent" for the next step in cargo movement. The staff of Cargo Law first coined the term "travel agent for freight" roughly 15 year ago. We're quite happy that a simple term now explains the reality of our industry.

The Official Court Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND U.S. CIRCUIT - NEW YORK

2000 U.S. App. LEXIS 21434

(Argued May 25, 2000 - Decided August 24, 2000)

Docket No. 99-9025

PRIMA U.S. INC., Plaintiff, M/V ADDIRIYAH, HER ENGINES, BOILERS, ETC., Defendant, UNITED ARAB SHIPPING COMPANY, Defendant-Third-Party-Plaintiff, WESTINGHOUSE ELECTRIC CORP., Third-Party-Defendant-Fourth-Party-Plaintiff-Appellee,

- vs. -

PANALPINA, INC., Fourth-Party-Defendant-Appellant.

PRIOR HISTORY:

[*1] Defendant Panalpina appeals from an order of the United States District Court for the Southern District of New York (Hellerstein, J.), ordering it to indemnify Westinghouse.

DISPOSITION: REVERSED.

JUDGES: McLAUGHLIN AND CALABRESI, Circuit Judges, & MUKASEY, District Judge. *

* The Honorable Michael B. Mukasey of the U.S. District Court for the Southern District of New York, sitting by designation.

OPINION BY: McLAUGHLIN

OPINION: McLAUGHLIN, Circuit Judge:

BACKGROUND --

The Westinghouse Electric Corporation ("Westinghouse") contracted in writing with Panalpina, Inc. ("Panalpina"), a "freight forwarder," for the transportation and shipment of an electric transformer from the manufacturer (in Italy) to the ultimate consignee, the 3M Corporation (in Iowa). Panalpina, as freight forwarder, was to oversee all of the transportation [*2] for the transformer, both on land and over sea. Aware of its obligation, Panalpina stated to Westinghouse, "rest assured your shipment will receive door to door our close care and supervision"

Panalpina's obligations under the contract included ensuring that the transformer was properly secured and lashed onto a flat-rack for ocean shipment. Westinghouse paid Panalpina \$21,785.00, for its services. As is the industry custom, Panalpina did not issue a bill of lading for the shipment.

Westinghouse and Panalpina had done business on countless occasions. Pursuant to the standard "Terms & Conditions" listed on the reverse side of its contract, Panalpina undertook to exercise "reasonable care" in the selection of those who would actually carry, store or otherwise handle the goods. The standard terms also limited Panalpina's liability for losses to \$50 per shipment, and they disclaimed liability for all consequential or special damages in excess of this amount. These were the same terms utilized in the prior ten-year course of dealing involving over 1,000 transactions between Westinghouse and Panalpina.

When the time came to ship the transformer, Panalpina arranged for it [*3] to be picked up at a factory in Melegano, Italy, and brought to the Port of Genoa for an ocean trip. In Genoa, Panalpina hired Ligure Toscano, a customs broker, to coordinate the movement of the transformer through the Genoa Port. Because the transformer was oversized, it had to be secured to a forty foot "flat-rack" container for ocean shipment. Through Toscano, Panalpina hired CSM, a local stevedore, to load the transformer onto the appropriate container, and to lash it securely for the trip. The transformer, on its flat-rack, was loaded aboard the M/V Addiriyah for the voyage to the United States.

Panalpina never inquired of CSM how the transformer was lashed for the ocean voyage. Nor did it supervise the endeavor. On the other hand, Westinghouse never requested that Panalpina be present at any point during the shipment of the transformer, and specifically retained Panalpina only to arrange for the various services in connection with the export of the transformer from Italy to the United States. CSM, moreover, was a well-known stevedore and had often been utilized by other well-known freight forwarding companies, including the United Arab Shipping Company (owner of the M/V Addiriyah, [*4] the ship that carried the transformer).

During the ocean voyage, the M/V Addiriyah encountered heavy seas and the transformer, which CSM had negligently lashed to its flat-rack, broke loose, crushing a laser cutting machine owned by Prima (U.S.A), Inc. ("Prima").

In 1998, Prima, via its subrogated insurer, filed a complaint in the United States District Court for the Southern District of New York (Hellerstein, J.), against: (1) the United Arab Shipping Company ("United") (as owner of the M/V Addiriyah); (2) Westinghouse; and (3) Panalpina. Prima sought damages for the loss of its laser. United filed a third-party action against Westinghouse for indemnification, and for clean up costs related to some silicon that had spilled from the broken transformer. A fourth-party action was then filed by Westinghouse against Panalpina for indemnification.

Panalpina moved for summary judgment, dismissing: (1) Westinghouse's fourth-party action; and (2) Prima's direct suit. The district court denied both prongs of the motion.

At a bench trial, the district court then awarded: (1) Prima \$ 2500.00 from United; (2) United \$ 103,508.19 from Westinghouse for the costs of cleaning up the spilled [*5] silicon; and (3) Prima \$ 260,000.00 from Westinghouse for the broken laser. The court held that Westinghouse was directly liable to United for the spilled silicon; and directly liable to Prima for the broken laser, because Westinghouse had stipulated that it was engaged in a maritime venture, and thus subject to the Carriage of Goods by Sea Act ("COGSA"). 46 U.S.C. App. § 1300 et. seq.

The district court went on to find Panalpina liable to Westinghouse, in indemnity, for both the spilled silicon and the broken laser awards, because the contract that Panalpina had entered with Westinghouse stated that Panalpina would give "door to door ... close care and supervision." Because of that clause in the contract, the court found that any negligence of the stevedore, CSM, in lashing the transformer was imputed to Panalpina.

Panalpina now appeals, challenging the district court's decision that it must indemnify Westinghouse for CSM's negligent actions. Panalpina asserts that it is only a freight forwarder, and hence, should not be made to indemnify Westinghouse.

DISCUSSION BY THE COURT:

This court reviews conclusions of law, as well as mixed questions of law and [*6] fact, de novo. See *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 988 (2d Cir. 1990); *Muller ex rel. Muller v. Committee on Special Educ. of East Islip Union Free Sch. Dist.*, 145 F.3d 95, 102 (2d Cir. 1998). We apply a de novo standard in this case because the question whether an entity is a freight forwarder is a mixed question of law and fact.

I. Panalpina Was A Freight Forwarder, Not A Carrier

The job of a non-vessel operating common carrier ("NVOCC") is to consolidate cargo from numerous shippers into larger groups for shipment by an ocean carrier. See *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Acme Fast Freight, Inc.*, 336 U.S. 465, 467-68, 93 L. Ed. 817, 69 S. Ct. 692 (1949); *Insurance Co. of North America v. S/S American Argosy*, 732 F.2d 299, 300-01 (2d Cir. 1984). A NVOCC - as opposed to the actual ocean carrier transporting the cargo issues a bill of lading to each shipper. If anything happens to the goods during the voyage the NVOCC is liable to the shipper because of the bill of lading that it issued. See *Modern Office System, Inc. v. Aim Caribbean Express, Inc.*, 802 F. Supp. 617, 623 (D.P.R. 1992); [*7] *Fireman's Fund American Insurance Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294, 1296 (1st Cir. 1974).

A freight forwarder like Panalpina, on the other hand, simply facilitates the movement of cargo to the ocean vessel. The freight forwarder: secures cargo space with a steamship company, gives advice on governmental licensing requirements, proper port of exit and letter of credit intricacies, and arranges to have the cargo reach the seaboard in time to meet the designated vessel.

New York Foreign Freight Forwarders and Brokers Ass'n v. Federal Maritime Comm'n, 337 F.2d 289, 292 (2d Cir. 1964); see also, 46 C.F.R. § 510, et. seq. Freight forwarders generally make arrangements for the movement of cargo at the request of clients and are vitally different from carriers, such as vessels, truckers, stevedores or warehouses, which are directly involved in transporting the cargo. Unlike a carrier, a freight forwarder does not issue a bill of lading, and is therefore not liable to a shipper for anything that occurs to the goods being shipped. See *United States v. American Union Transport*, 327 U.S. 437, 442-43, 90 L. Ed. 772, 66 S. Ct. 644 (1946) [*8] (stating that independent forwarders "assume no responsibility for the transportation of goods"). As long as the freight forwarder limits its role to arranging for transportation, it will not be held liable to the shipper. See *J.C. Penney v. The American Express Co.*, 102 F. Supp. 742, 747 (S.D.N.Y. 1951); *Zima Corp. v M/V Roman Pazinski*, 493 F. Supp. 268, 273 (S.D.N.Y. 1980); *Consolidated Int'l Corp. v. S.S. Falcon*, 563 F. Supp. 969 (S.D.N.Y. 1983).

Panalpina did not issue a bill of lading and it did not consolidate cargo. It was hired by Westinghouse simply as a freight forwarder to arrange for the transportation of a transformer from Italy to Iowa. By analogy, Panalpina was hired to act as a "travel agent" for the transformer: it set things up and made reservations, but

did not engage in any hands-on heavy lifting. Admittedly, Panalpina did state that Westinghouse's "shipment [would] receive door to door our close care and supervision" However, because of the well settled legal distinction between forwarders and carriers, that statement - mere puffing - cannot transform Panalpina into a carrier, and bestow liability upon [*9] it.

In Government of the *United Kingdom of Great Britain and Northern Ireland v. Northstar Services, Ltd.*, the District Court of Maryland held that Panalpina (in another dispute) was not liable to a plaintiff that had hired it as a freight forwarder. 1 F. Supp. 2d 521 (D.Md. 1998). In Northstar, the trucking company that Panalpina had hired to move cargo damaged that cargo, and Panalpina was sued in its role as the freight forwarder for having breached its duty to inquire into Northstar's reputation and practices. The district court there held that Panalpina took reasonable measures in hiring Northstar, and, as a mere facilitator, was not responsible for the negligence of the trucker. Id.

This case is much like Northstar. Panalpina was a freight forwarder, hired by Westinghouse to arrange for transportation and incidental services, and to select the companies that would perform those tasks. It was not a carrier, and is therefore not responsible for the damages caused by the poorly lashed transformer. n1

Panalpina hired CSM as a stevedore to load and lash the transformer. CSM was the same stevedore that was used by United Arab Shipping, and was the designated official Port of Genoa stevedore. Panalpina clearly acted reasonably in hiring CSM on behalf of Westinghouse, fulfilling its duties as a freight forwarder. Panalpina is not liable to Westinghouse for CSM's negligent actions.

CONCLUSION OF THE COURT:

For the foregoing reasons, we REVERSE the district court's order that Panalpina indemnify Westinghouse, and remand to the district court to enter judgment accordingly.

FOOTNOTES:

n1 Of course a party that calls itself a freight forwarder might in fact be performing the functions of a carrier, in which case function would govern over form. But the burden of demonstrating any deviation from what freight forwarders normally do in the maritime context must rest, and heavily so, on the party who would show such deviation. Cf. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Acme Fast Freight, Inc.*, 336 U.S. at 467 (applying the term "freight forwarder" in the railroad context to entities that consolidate cargo and issue bills of lading).

[*10] Moreover, when a freight forwarder selects someone to perform transportation services, that selection fulfills the forwarder's obligations in the absence of proof that the selection itself was negligent. See *John Brown Engineering, Ltd. v. Hermann Ludwig, Inc.*, 1991 AMC 2540 (D.S.C. 1991).

End of opinion