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Carrier Liability: WHEN IS CARGO DELIVERED?

*Jason C. Palmer**

The Carmack Amendment to the Interstate Commerce Act holds motor carriers responsible for the cargo they carry while in transit, up until they deliver the cargo.[1] The United States Supreme Court has interpreted the Carmack Amendment as follows:

> [U]nder federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows *delivery* in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability.[2]

Liability under the Carmack Amendment ceases when goods are delivered to the proper person.[3] Thus, it becomes important to determine whether "delivery" actually occurred in order to determine which party is liable for damage to cargo or bears the risk of loss or damage as the case might be. If the cargo is "delivered" and damaged thereafter, the carrier can no longer be deemed liable for damage or loss. However, if "delivery" has not yet occurred when the cargo is damaged, the carrier is liable for the damage or loss pursuant to the Carmack Amendment. This article discusses when cargo is finally "delivered" under Carmack and thus relieving the motor carrier of liability.

A. What Constitutes Delivery Under the Carmack Amendment

Delivery has been generally defined as when one party surrenders, and the other party accepts, possession and control of the goods involved.[4] Delivery under Carmack seems to mean delivery as required by a contract in writing or by custom, practice and intention of the parties.[5] Cases are fairly uniform in this regard in most jurisdictions—either you must follow the specific instructions set out in a contract or bill of lading, or you rely on the local or special custom at the destination.[6] The above-stated premise being said, "[t]he mere arrival of goods at their destination does not reduce the liability of the carrier ... where anything remains to be done by the carrier in order to effectuate a delivery."[7] The owner is entitled to a reasonable opportunity to take or receive the property after transit is terminated.[8] Additionally, it is implied in a carriage contract the duty to deliver, absent special circumstances, to the right person, at the right time, and in the proper manner.[9]

In *Intech, Inc. v. Consolidated Freightways, Inc.*, for instance, the United States Court of Appeals for the First Circuit considered what constitutes delivery for the purposes of determining liability under the Carmack Amendment.[10] The Court explained that, "since 'delivery' must mean delivery as required by the contract of carriage, (*i.e.*, the bill of lading . . .) the *intention of the parties* explains its scope."[11] Thus, the Court considered the language in the straight bill of lading between the parties to determine what was intended by the parties. The Court noted that "a 'straight bill of lading' ... simply requires delivery of the goods to the consignee. Generally, the spotting of a shipment at the consignee's place of business constitutes delivery regardless of whether the consignee has accepted or rejected the goods."[12] "However, spotting a shipment is not *final* delivery if anything remains to be done by the carrier in order to effectuate a delivery."[13] The Court looked to the bill of lading to determine whether there was an additional step the carrier was required to complete to effectuate the delivery pursuant to the contract.[14] Because the contract contained language that made a reference to a letter which seemingly shifted the responsibility of unloading the cargo to the carrier (as opposed to the shipper, who only had to assist in unloading the load), the Court concluded that "reasonable persons could have differed as to the *intention of the parties* at the time the bill of lading was issued."[15] Therefore, because the *Intech* Court was considering the carrier's motion for summary judgment, the Court looked at the evidence in the light most favorable to the shipper and assumed that the bill of lading required the carrier to unload the cargo for delivery to be complete.[16] Thus, the motion was denied.

*Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, Iowa

The holding in *Intech* provides a helpful framework in analyzing what constitutes "delivery" pursuant to the Carmack Amendment. Because the bill of lading is a contract between the carrier and the shipper, it is used to define "delivery" as it relates to the transaction for which it was created. Thus, the language of the bill of lading is essential to determining what constitutes "delivery" in every case. Where the bill of lading does not contain references to additional agreements, the general rule that spotting of the cargo at the consignee's place of business constitutes delivery applies because it is the assumed intent of the parties. However, where a bill of lading makes reference to additional steps in the delivery process, courts must consider the language of the contract and the intention of the parties to determine what "delivery" should mean pursuant to the contract.

Such an example arose in *Eddie Bauer, Inc. v. Focus Transp. Serv.*, where the United States District Court for the Northern District of Illinois decided another case involving spotting.[17] The Court considered whether a carrier who spotted a truckload on the property of another carrier had delivered the load to the second carrier in order to determine whether the second carrier should be held liable when the cargo was stolen from the second carrier's property.[18] The Court applied the basic principle gleaned from *Intech*, explaining that "subject to the *intent of the parties*, delivery occurs when one party surrenders, and the other party accepts possession, custody, and control of the goods involved."[19] Arguing that there was not proper delivery, the second carrier asserted that spotting and leaving a trailer unattended could not constitute delivery under the arrangements between the parties as well as the normal course of dealing with the first carrier.[20] However, the Court determined otherwise.[21]

The Court predicated its finding, in part, based upon evidence that the first carrier had spotted a trailer on the property of the second carrier at least a dozen times prior to this incident and the second carrier had always accepted the shipment.[22] The Court further found that the general manager of the second carrier had placed a pinlock on the trailer indicating that the second carrier was given "exclusive control over the shipment [which] leads inescapably to the conclusion" that the goods were delivered to the second carrier prior to their theft.[23] Thus, the second carrier was liable to the shipper as a matter of law because the goods were stolen while in the second carrier's possession.[24]

Other courts have also found as a matter of law that delivery has occurred, even in situations in which the facts may initially indicate otherwise.[25]

In a similar vein, there are also factual scenarios in which courts have determined that delivery has not occurred, even when some of the facts presented make it look as though there was delivery.[26] In *Brockway Smith Co. v. Boston and Maine Corp.*, the carrier, Boston and Maine Corporation (B&M), argued it delivered the cargo at the destination and thus it was absolved of liability under Carmack. The Court disagreed noting that B&M could not complete delivery by simply dropping the railcar at the derailing switch. Relying upon Fifth Circuit precedent, the Court insisted that "the mere arrival of goods at their destination does not reduce the liability of the carrier ... where anything remains to be done by the carrier in order to effectuate a delivery. The owner is entitled to a reasonable opportunity to take or receive the property from the possession of the carrier after the transit is terminated."[27] In holding the shipment was still in transit at the time of the loss, the Court found, in addition to the established custom and usage between the parties, that "[l]eaving the car at the switch out of sight of the plant and without notifying plaintiff presented no reasonable opportunity for plaintiff to take possession of the shipment."[28] Thus, whether delivery occurred in a specific scenario is highly dependent on facts that indicate the intent of the parties, the regular interaction between the parties, and the action of the parties under the circumstances.[29]

B. Delivery Under State Bailment Law

It is important to note that the Carmack Amendment preempts all state and common law claims and is the exclusive remedy to shippers for loss or damage in interstate transit.[30] Thus, state bailment claims are inapplicable where the Carmack Amendment applies. That being recognized, the concept of delivery under state law is worth considering when discussing "delivery" under Carmack.

Delivery is a key component in the creation of a bailment.[31] There must be a transfer of possession and control of the property to the bailee to form a bailment.[32] However, this can be in the form of an actual *or constructive* delivery.[33] Further, there must be a lawful severance of possession and ownership to constitute a bailment, as well as granting the bailee sole custody and control of the property.[34] Property delivered to the bailee by a third person and not the owner does not affect the bailee relationship.[35]

Iowa Civil Jury Instruction 2300.2 states that a bailment for hire is created when "a person *accepts delivery of property* from the owner for storage", and when there is "an agreement express or implied, that something is to be paid by the owner for such storage." (Emphasis added). Further, the Court in *Reimers* concluded that no bailment was created, partially due to the fact that there hadn't been "acceptance of possession."[36]

In *Metzger v. Kum & Go, Krause Holdings, Inc.*[37] the Iowa Court of Appeals analyzed the concept of delivery in the bailment context. In this case, the Court considered

whether an individual's use of a storage unit created a bailment between Kum & Go, the owner of the unit, and Metzger, the person who used the unit. The Court cited to *Khan v. Heritage Property Management*, indicating that there must be delivery—a transfer of possession—to have a bailment.[38] "In order to constitute such a transfer, there must be such a full transfer … of the property to the bailee as to exclude the possession of the owner and all other persons, and give to the bailee, for the time being, the sole custody and control thereof."[39] The Court agreed with the district court in determining there was no genuine issue of fact as to whether a bailment occurred because there was no evidence presented that led the court to believe there was delivery.[40] In deciding this, the Court found Metzger placed all of his belongings in the storage unit, had his own padlock on the unit, Kum & Go never had a key, and, when another foreign padlock was found on the unit, Kum & Go did not have a key to the lock.[41] The Court deemed this sufficient evidence to determine that "no reasonable juror could find that Kum & Go ever came into exclusive possession of Metzger's goods."[42] Therefore, because there was no delivery, there was no bailment, and summary judgment was affirmed on behalf of Kum & Go.[43]

Khan and *Metzger* both stand for the proposition that a bailment can only be achieved where delivery constitutes a transfer in control or possession to the bailee—a transfer that gives the bailee sole custody and control of the transferred goods until the bailment is concluded.[44] Thus, where such a transfer is made, there is likely a bailment created for which there may be a state law claim.

Several cases describing the concept of bailment in other states have given further descriptions of situations in which an item is considered "delivered."[45]

Thus, other states have consistently held that delivery is achieved when there is a transfer of possession to the bailee for purposes of a state claim based on a bailment duty. Such a transfer, therefore, is necessary for the creation of a bailment.

C. Industry Examples: Bills of Lading

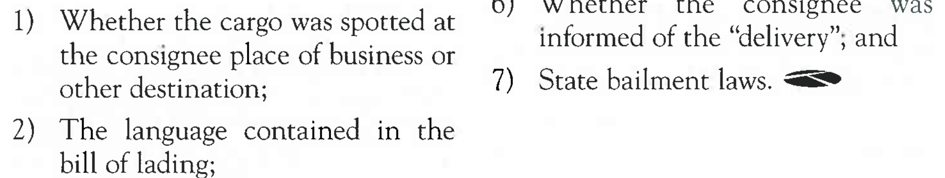
As illustrated above, the language contained in the bill of lading can be of paramount importance when determining if "delivery" has occurred under Carmack. The following are examples of Bills of Lading that have references to liability or what constitutes "delivery:"

> **Delivery:** If delivery of the Goods or Containers or other packages or any part thereof is not taken by the Merchant when and where and at such time and place as the Carrier is entitled to have the Merchant take delivery, they shall be considered to have been delivered to the Merchant, and thereafter always to be at the risk and expense of the Merchant and Goods. If the Goods are stowed within a Container owned or leased by the Carrier, the Carrier shall be entitled to devan the contents of any such Container, whereupon the Goods shall be considered to have been delivered to the Merchant and the Carrier, may at its option, subject to its lien and without notice, elect to have same remain where they are or sent to a warehouse or other place, always at the risk and expense of the Merchant and Goods.[46]
>
> (C) Where the liability scheme for interstate surface transportation set forth in United States of America laws collectively known as the "Carmack Amendment" ("Carmack"), 49 U.S.C. sections 14706 and/or 11706, would otherwise apply to the Carriage of the Goods or any segment of such Carriage, the Merchant expressly agrees to a waiver of the Carmack liability scheme, and the Merchant expressly agrees that this Bill of Lading, and particularly, this paragraph, satisfies the express written waiver required under 49 U.S.C. section 14101(b), of all of the Merchant's rights and remedies under Carmack, excluding the provisions governing registration, insurance, or safety fitness.[47]
>
> **Delivery:** 12.1. The Cargo shall be deemed to be delivered when it has been delivered to or placed at the disposal of the Merchant or its agent in accordance with this Non-Negotiable Bill of Lading, or when the Cargo has been delivered to any authority or other party to which, pursuant to the law or regulation applicable at the place of delivery, the Cargo must be delivered, or such other place at which the Carrier is entitled to call upon the Merchant to take delivery.[48]
>
> **Delivery:** If delivery of the Goods or any part thereof is not taken by the Merchant, at the time and place when and where the Carrier is entitled to call upon the Merchant to take delivery thereon, the Carrier shall be entitled to store the Goods or any part thereof at the sole risk of the Merchant, where upon the liability of the Carrier in respect of the Goods or that part thereof stored as aforesaid (as the case may be) shall wholly cease and the cost of such storage (if paid by or payable by the Carrier or any agent of sub-contractor

of the Carrier) shall forthwith upon demand be paid by the Merchant to the Carrier.[49]

Such examples indicate that companies have attempted to provide for language that limits the scope of the Carmack Amendment to "delivered" items and to even contract around Carmack liability. *See* Aeronet, Ocean Bill of Lading, *supra*. While these examples refer to "delivery," what constitutes delivery still seems to be open to interpretation under the contract, and the factual pattern surrounding what may constitute delivery of the cargo. In the end, parties to the dispute will want to examine the following to determine if delivery has occurred:

1) Whether the cargo was spotted at the consignee place of business or other destination;
2) The language contained in the bill of lading;
3) The language contained in any other freight contracts;
4) The past pattern and practice of the parties regarding delivery;
5) Whether the bill of lading was signed by the consignee;
6) Whether the consignee was informed of the "delivery"; and
7) State bailment laws.



Endnotes

1. *See* 49 U.S.C. § 14706 (2009).
2. *Missouri Pac. R. Co. v. Elmore and Stahl*, 377 U.S. 134 (1964) (emphasis added).
3. *See Rêpublic Carloading & Distributing Co. v. Missouri Pac. R. Co.* 302 F.2d 381, 386 (8th Cir. 1962).
4. *See Illinois Central R.R. v. Moore*, 228 F.2d 873, 877 (6th Cir. 1956).
5. *See, e.g., Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc.*, 871 F. Supp. 1010, 1014 (N.D. Ill. 1994) (regular practice of dropping cargo at drop point and informing party of drop constituted delivery); *Brockway-Smith Co. v. Boston and Maine Corp.*, 497 F. Supp. 814, 818 (D. Mass. 1980) (no delivery when railway car dropped at lot and owner not informed of drop and owner had informed shipper not to drop cars); *Intech, Inc. v. Consolidated Freightways, Inc.*, 836 F.2d 672, 674 (1st Cir. 1987) (delivery governed by bill of lading and the intent of the parties regardless of whether the cosignee has accepted or rejected the goods); *Castle & Cooke, Inc. v. Seaboard Coast Line R.R. Co.*, 275 So. 2d 586, 587 (Fla. App. 1973) (delivery completed when cargo left at business after hours on property based on prior custom).

   In *Tokio Marine*, the Court granted summary judgment for the defendants after cargo was stolen from a loading dock defendants had delivered the cargo to. There was notification of the delivery and the next carrier had specific knowledge of the delivered goods: 871 F. Supp. At 1012.
6. *See id.; see also Southern Advance Bag & Paper Co. v. Terminal R. Assn. of St. Louis*, 171 S.W.2d 107 (Mo. App. 1943); *Arkansas R.R. v. Winters*, 265 S.W. 967 (Ark. 1924).
7. *Keystone Motor Freight Lines v. Brannon-Signaigo Cigar Co.*, 115 F.2d 736, 738 (5th Cir. 1940).
8. *Id.*
9. *See, e.g., Refrigerated Transport Co., Inc. v. Hernando Packing Co., Inc.*, 544 S.W.2d 613, 615 (Tenn. 1976).
10. 836 F.2d 672, 674-75 (1st Cir. 1987).
11. *Id.* at 674 (citing *Georgia, F. & A. Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, 195 (1916) (internal quotations omitted)).
12. *Id.* (internal citations and quotations omitted).
13. *Id.* at 674-75.
14. *Id.* at 675.
15. *Id.*
16. *Id.*
17. 881 F. Supp. 1174 (N.D. Ill.1995)
18. *Id.* at 1180-81.
19. *Id.* at 1180 (citing Intech, Inc., 826 F.2d 674-75).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 1181.
24. *Id.*
25. *See, e.g., Polygram Group Distrib., Inc. v. Transus, Inc.*, 990 F. Supp. 1454 (N.D. Ga. 1997) (holding that where there was a straight bill of lading, a carrier's delivery of goods to the address designated on the bill of lading constituted delivery pursuant to the terms of the Carmack Amendment even though the individual who signed for the goods was not an employee of the consignee); *Tokio Marine*, 871 F. Supp. at 1015 (explaining that "chanting a mantra is no substitute for arguing the evidence" where the record showed no support for the assertion that the first carrier was required to physically deliver containers to the second carrier to constitute delivery and the custom, practice, and intention of the parties indicated the delivery occurred, thereby holding the second carrier liable); *Castle & Cooke, Inc. v. Seaboard Coast Line R.R. Co.*, 275 So. 2d 586, 587 (Fla. App. 1973) (delivery completed when cargo left at business after hours based on prior custom); *Intercargo Ins. Co. v. Burlington Santa Fe R.R.*, 185 F. Supp.2d. 1103, 1113 (C.D. Cal. 2001) (holding that although an imposter had posed as a driver from the company hired to pick up goods from the railroad, the railroad could not be held liable for stolen goods because the railroad had de-ramped the goods from its rails and notified the party to pick the goods up, which constitutes legal delivery).
26. For instance, in *Brockway-Smith Co. v. Boston and Maine Corp.*, 497 F. Supp. 814, 818 (D. Mass. 1980), an action was brought by the buyer and its insurers against the carrier to recover for freight damage to a shipment of frames, windows, and doors.
27. *See id.* (*quoting Keystone Motor Freight Lines v. Brannon-Signaigo Cigar Co.*, 115 F.2d 736, 738 (5th Cir. 1940)).
28. *Id. See also Strickland Transp. Co. v. Am. Distrib. Co.*, 198 F.2d 546 (5th Cir. 1952) (holding that even though the carrier may have permitted

unauthorized inspection of the load, it did not constitute a delivery of the goods because the bill of lading was not surrendered); *Norton McNaughton, Inc. v. Polar Air Cargo*, 2000 N.Y. 20042, slip op. (N.Y. 1999) (holding that even though a receipt was signed saying the three pallets of goods were delivered, the first carrier should have recognized that delivery had not occurred because only the first two pallets were picked up by the second carrier and, thus, the first carrier could be held liable for stolen pallets); *Brockway-Smith Co. v. Boston and Maine Corp.*, 497 F. Supp. 814, 818 (D. Mass. 1980) (holding there was no delivery when railway car dropped at a lot, the owner was not informed of drop, and the owner had informed shipper not to the drop cars).

29. *See Polar Air Cargo*, 2000 N.Y. 20042, slip op. N.Y. 1999; Intech, 826 F.2d at 672; Eddie Bauer, 881 F. Supp. at 1174; *Amato Motors*, 871 F. Supp. at 1010.
30. *See Adams Express Co. v. Croninger*, 226 U.S. 491 (1913).
31. *Khan v. Heritage Prop. Mgmt.*, 584 N.W.2d 725, 730 (Iowa App. 1998).
32. *Id.*
33. *Id.* (emphasis added); *see also Metzger v. Kum & Go, Krause Holdings, Inc.*, 2007 WL 752287 (Iowa Ct. Appl March 14, 2007) (*citing Khan* for same premise); *Jensen v. Interstate Transit Lines*, 266 N.W. 9, 11 (Iowa 1936) (finding same).
34. *See Walters v. Sanders Motor Co.*, 294 N.W. 621, 622 (Iowa 1940) (finding a bailment existed in possession of car for repairs). But see *Reimers v. Petersen*, 22 N.W.2d 817, 820 (Iowa 1946) (finding contract for parking a lease of space as opposed to a contract for care, so insufficient control to find a bailment).
35. *State v. Welsh*, 245 N.W.2d 290, 294 (Iowa 1976) (discussing statutory embezzlement).
36. 22 N.W.2d at 820.
37. *Metzger*, 2007 WL 752287, *2.
38. *Id.* (citing *Khan*, 584 N.W.2d at 730).
39. *Id.* (citing Reimers, 22 N.W.2d at 820 (internal citation omitted).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *See Metzger*, 2007 WL 752287, *2; *Khan*, 584 N.W.2d at 729-30.
45. *See, e.g., LaPlace v. Briere*, 962 A.2d 1139, 1146 (N.J. 2009) (citing *Moore's Trucking Co. v. Gulf Tire & Supply Co.*, 87 A.2d 441 (N.J. App. 1952)) (explaining that a "bailment arises when a person leaves his chattel on the premises of another if the latter is given primary control of the chattel for the time being," and listing examples of bailments that include: "jewelry checked with a swimming pool attendant; diamonds delivered to a retail jeweler 'on memorandum' for sale; automobile placed in shop to be washed; [and an] airplane stored in a hangar."); *Swain v. Richland Corr. Inst.*, 2004 WL 2029948 (Ohio Misc. 2004) (holding that an inmate's failure to show he delivered legal documents to the correctional institution staff resulted in a failure to show a bailment duty on behalf of the correctional institution); *Atlantic Contracting & Material Co. v. Adcock*, 588 S.E.2d 36 (N.C. App. 2003) (holding that "delivery" is defined as bailor's relinquishing exclusive possession, custody, and control to bailee); *Ferucci v. Atlantic City Showboat, Inc.*, 51 F. Supp. 129, 134 (D. Conn. 1999) (holding that, under Connecticut law, bailment requires the bailed property to be placed in the sole possession of the bailee); *Jensen v. Interstate Transit Lines*, 266 N.W. 9, 11 (1936) (finding bus company not guilty for damaged bags stored in bus because no complete control of the baggage); *Continental Ins. Co. v. Himbert*, 37 So.2d 605 (La. Ct. App. 1948) (defendant not liable for theft of car in lot after business hours when agreement with plaintiff to place keys in car constituted constructive delivery to plaintiff); *Tammelleo v. Solomon*, 66 A.2d 101 (R.I. 1949) (parking lot not liable for taking and damage of car after business hours when agreement with owner to leave key in automobile constituted constructive delivery back to plaintiff); *D.A. Schulte, Inc. v. North Terminal Garage Co.*, 197 N.E. 16, 20 (Mass. 1935) (since defendant had no knowledge of contents of car, could not be liable for bailment of car contents, only the car); *Rossman v. Greenberg Lakewood & Mountain Line*, 119 N.Y.S.2d 789, 792 (N.Y. Mun. Ct. 1953) (second carrier not responsible for first carrier's loss of bag when second carrier lacked knowledge of the first carrier's possession); *Sisters of Charity of the Incarnate Word v. Meaux*, 122 S.W.3d 428, 432-33 (Tex. App. 2003) ("[h]aving failed to establish either the delivery and acceptance of exclusive possession in the defendant, or defendant's specific knowledge of articles entrusted to him, plaintiff has failed to establish the necessary elements of [bailment]"); *Theobald v. Satterthwaite*, 190 P.2d 714, 715-16 (Wash. 1948) (no change of possession or delivery of property or exclusive possession where defendant unaware the property had been left in its reception room).
46. Seaboard Marine, Bill of Lading—Terms and Conditions, http://www.seaboardmarine.com/SML/BillofLadingTermsandConditions.htm (last visited March 12, 2010).
47. Aeronet, Ocean Bill of Lading, www.aeronet.com/corporate/documents/OceanBillOfLading_TC.pdf (last visited March 12, 2010).
48. Schumacher Cargo Logistics, Multimodal Bill of Lading—Contract for Carriage, www.schumachercargo.com/.../new_combined_transport_bill_of_lading.pdf (last visited March 12, 2010).
49. Seafast, Bill of Lading Definitions, http://www.seafast.com.au/billoflading.htm (last visited March 12, 2010).