



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Goulart Trucking, Inc.

File: B-251140.4

Date: September 28, 1993

DIGEST

1. Once it is determined that a carrier is prima facie liable for transit loss or damage, to escape liability the carrier must prove by clear and convincing evidence that it was not negligent and that the damage was due to an excepted cause (e.g., caused by the shipper).

2. Insertion of a tender number on a bill of lading, while some indication of the parties' intent, is not conclusive as to the agreement and is not necessarily determinative of the government's obligations.

DECISION

The Defense Finance and Accounting Service (DFAS) requests that we adjudicate a doubtful claim against Goulart Trucking, Inc., for \$369,995 involving damage to a March 1990 shipment of electronic equipment. DFAS should initiate collection against Goulart.

Under Government Bill of Lading (GBL) C-7,270,471, Goulart agreed to transport an estimated 480,000 pounds of navigational and electronic equipment, in several truckloads, between Naval facilities in the San Diego area. The GBL provided that the shipper would load and the consignee would unload, and that Goulart's tariff/special rate authority "GOUA0006" would apply. On March 20, 1990, while transporting one of the truckloads, heat from the vehicle's exhaust system ignited adjacent packaging and damaged the load.

Goulart denies all liability; it contends that the Navy was responsible for the damage because, when the fork lift operator loaded the vehicle, he pushed a heavily loaded pallet against a bracket on the tractor's exhaust pipe. According to Goulart, this broke the exhaust stack seal, moved the exhaust pipe and allowed hot diesel fumes to escape, igniting the cargo. To support its contention, Goulart has furnished a statement from the vehicle's driver explaining the damage and his view of the cause, and the

local fire department's report listing the cause as a broken exhaust pipe.

Alternatively, Goulart contends that even if it is liable, liability is limited to \$19,345 based on the language in a July 1988 Service Agreement with the Navy providing that Goulart "shall assume liability, not to exceed \$2.50 per pound for any and all Government material lost or damaged in the movement covered by this agreement." Goulart interprets this wording to mean that the weight of the material damaged, not the total weight of the shipment, is the basis of liability.¹ Goulart offers no written evidence that the Service Agreement of July 12, 1988 was extended beyond its expiration date of July 15, 1989.

The Navy investigated the matter and provided an affidavit from its fork lift operator who stated that he loaded the vehicle in accordance with the specific instructions of Goulart's driver: "tight against the head board frame." The fork lift operator denied that the carrier's equipment sustained any damage during or after the loading operation. The Navy believes that any alleged damage to the exhaust system would have been open, obvious and readily discernable by ordinary observation.

Further, the Navy maintains that Goulart is liable for the full value of any damages since the firm did not effectively limit its liability in any manner in this shipment. The Navy points to Goulart's failure to prove that the 1988 Service Agreement was extended to cover shipments originating after July 15, 1989.

Generally, to recover from a carrier for damaging property, a shipper must establish a prima facie case by showing tender to the carrier, delivery in a more damaged condition, and the amount of damages. Thereafter, the burden of proof is on the carrier to show that it was free from negligence and that damage was due to an excepted cause (e.g., the act of the shipper) relieving the carrier of liability. See Missouri Pacific Railroad Co. v. Elmore & Stahl, 377 U.S. 134, 137-138 (1964). In this case, Goulart does not dispute that it received the property in good condition, that it delivered it in damaged condition, or that the actual damages were otherwise than as stated by the Navy; there is a prima facie case of liability. For Goulart to prevail, it must prove by clear and convincing evidence that the damage was caused by the shipper and that it was not negligent.

¹The actual weight of the damaged material was 7,738 pounds; therefore, under Goulart's theory, the limit on damages is that weight times \$2.50, or \$19,345.

See National Freight Council - Agent of Walsh Trucking Service, Inc., B-200549, Nov. 18, 1980.

When the shipper assumes responsibility for loading, it is liable for latent or concealed defects that cannot be discerned by ordinary observation by the carrier's agents. However, if improper loading is apparent on ordinary observation, the carrier will be liable despite the negligence of the shipper. See Gulf Pacific Agricultural Coop., Inc., 54 Comp. Gen. 742 (1975).

We are unable to conclude from the documentary evidence submitted by Goulart that the Navy clearly was responsible for the damage. For example, the exhaust system may well have been damaged prior to the tender of the equipment for loading. Further, any damage to the exhaust system may have been observable (visibly or audibly) by the driver. In this respect, the record is not clear what type of vehicle Goulart used for the shipment. The GBL, Goulart's voucher, and Goulart's initial submissions on the claim indicate that the vehicle ordered and furnished was a 40-foot flat bed trailer, whereas in later correspondence Goulart states that a truck was used; a broken exhaust pipe would have been easier to see in the space between a trailer and its tractor, as opposed to in the separation between a truck's cab and the cargo area. Finally, according to Goulart its driver did not actually even witness the loading,² and we note that the driver has not elaborated on the instruction the fork lift operator says he received on how to load the shipment ("tight against the headboard frame").

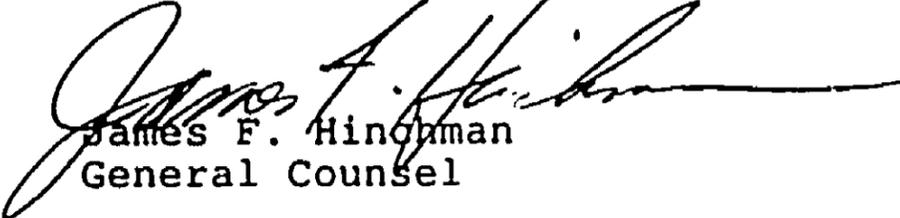
As stated above, the carrier has the burden of proving by clear and convincing evidence that it was not negligent and that damage was due to an excepted cause. In our view, Goulart has not done so here.

Regarding the measure of Goulart's liability, it appears from the record that the 1988 Service Agreement on which Goulart relies had expired by the time of this shipment. By its terms, the Agreement applied until July 15, 1989; the shipment occurred in March 1990. Goulart says that the Agreement was extended, but has furnished no evidence in that regard. The Navy reports that the activity that entered into the 1988 Agreement has been unable to provide any documentary evidence of extension.

²In describing how it believes the damage occurred, Goulart states "During this loading, my driver temporarily absent [sic] himself from the loading area to take care of other business. Upon his return, my rig was released as being loaded and ready to ship. My driver inspected the load and secured it with ropes, as usual."

The GBL refers to "GOUA0006" as the applicable rate authority. The 1986 Service Agreement, the one in effect prior to the 1988 Agreement, contained a reference to "GOUA0006" on the Standard Carrier Alpha Code line. It also contained a limitation of liability provision similar to the one in the 1988 Agreement. But the 1988 Agreement, which Goulart seeks to apply here, did not on its face incorporate or otherwise refer to "GOUA0006." The mere insertion on a GBL, while some indication of the parties' intent, is not conclusive as to the agreement and is not necessarily determinative of the government's obligations. See Starflight, Inc., 65 Comp. Gen. 84, 86 (1985). The lack of evidence of the extension of the Service Agreement, we believe, is more indicative of the parties' intent.

In sum, in the absence of any written evidence that the Service Agreement was extended beyond July 15, 1989, we have no basis to conclude that it applied here. DFAS should initiate collection action for the full amount of damage consistent with this decision.


James F. Hinohman
General Counsel