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DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-193432, B-211194 **DATE:** August 16, 1984

MATTER OF: Chandler Trailer Convoy, Inc.--
Reconsideration

DIGEST:

1. At common law, codified by section 20(11) of the Interstate Commerce Act, 49 U.S.C. 11707 (Supp. IV, 1980), a common carrier is liable without proof of negligence for all damage to goods transported unless the carrier shows that the damage was caused solely by (1) an act of God, (2) the public enemy, (3) the fault of the shipper, (4) act of public authority, or (5) the inherent nature of the goods shipped.

2. A prima facie case of liability is established when the shipper shows a failure by the carrier to deliver goods at destination in the same quantity or quality as received by the carrier at origin and the amount of damages.

3. Prima facie case of carrier liability for damage or loss of mobile homes has not been overcome where, in one case, the carrier's evidence of shipper fault is based on tire blowouts and, in the other case, is based on speculation, conjecture and inference from the fact of damage that the mobile home structure was defective.

4. The defense that damage in transit was the sole result of a common law exception to carrier liability must be established by the carrier by affirmative evidence and not by conjecture or inference.

Chandler Trailer Convoy, Inc. (Chandler), requests reconsideration of our decision in Chandler Trailer Convoy, Inc., B-193432, B-211194, Jan. 5, 1984, 84-1 C.P.D. ¶ 53, in which we denied in whole or in part claims for refund of amounts recovered by the shipping agencies for loss or damage in transit to four shipments of mobile homes. Chandler has requested reconsideration only of the shipments under government bills of lading (GBL) Nos. AP-300,655 and K-0,997,949.

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We affirm the decision disallowing the claim of Chandler under GBL No. AP-300,655 and the decision denying the claim of Chandler under GBL No. K-0,997,949.

At the outset, Chandler agrees that its liability in this case is governed by the decision in Missouri Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134 (1964), which was cited in our prior decision. In that decision, the United States Supreme Court held that at common law, codified by section 20(11) of the Interstate Commerce Act, 49 U.S.C. 11707 (Supp. IV, 1980), commonly referred to as the Carmack Amendment, a common carrier is liable without proof of negligence for all damage to goods transported unless the carrier shows that the damage was caused solely by (1) an act of God, (2) the public enemy, (3) the fault of the shipper, (4) act of the public authority, or (5) the inherent vice or nature of the goods shipped, and a prima facie case of liability is established when the shipper shows a failure by the carrier to deliver goods at destination in the same quantity or quality as received by the carrier at origin and the amount of damages.

Chandler contends that our Office erred, first, in construing the carrier's argument to be that the damage was the result of an inherent defect in the mobile homes transported; second, in holding that the effect of Chandler's tariffs and commercial bills of lading is to shift the burden of evidence from the carrier to the shipper; third, in rejecting Chandler's argument that its tariff's exculpatory provision received tacit approval by the decision of the Interstate Commerce Commission (ICC) in Transportation of Mobile Homes, Ex Parte No. MC-108; and, fourth, in confusing a legal tariff rule as opposed to an unlawful rule.

Chandler contended that the damages in transit resulted from defects in the mobile homes tendered for shipment. In our prior decision, we construed this argument as invoking the inherent vice of the goods exception. However, if the mobile homes were tendered by the shipper in a condition unfit for transit, and if damage resulted from that defective condition, as Chandler contends, the damage would be the result of the fault of the shipper. Lever Bros. Co. v. Baltimore & O. R. Co., 164 F.2d 738 (4th Cir. 1947). Chandler argues, therefore, that since the damage in transit occurred as a result of defects in the mobile homes furnished by the shipper, it is not liable, in the absence of negligence, under the Carmack Amendment, supra.

Chandler also contends that it is not liable under the exculpatory clauses in its tariff and commercial bills of lading which provide that Chandler shall not be liable for loss or damage to the commodity transported due to normal wear and tear and road hazards while in transit, or caused by any structural breakdown or other defect or the mechanical breakdown of the undercarriage, wheels, tires, brakes, wheel bearings, hitches, springs, frame, or any other part of the commodity being transported, or its accessories or equipment. Chandler contends that these clauses merely constitute a recitation of those causes of damage which would otherwise be an exception to carrier liability for loss or damage as a result of shipper fault and do not expand the exemptions to carrier liability. Chandler also argues that we erred in finding these clauses invalid. Since the ICC had before it for rulemaking the exculpatory clauses in ICC Ex Parte MC-108, supra, and did not order either that the clauses be removed from the carrier's tariffs or that qualifying provisions be included, it is Chandler's position that the exculpatory clauses must be presumed to be valid, citing S.W. Sugar Co. v. River Terminals, 360 U.S. 411 (1959). In that case, the Supreme Court held that an exculpatory clause may not be found invalid by a court in the absence of a determination by the ICC in the exercise of its primary jurisdiction.

For purposes of resolving this matter, we will assume, without deciding, that Chandler is correct in its position that the fault of the shipper rule applies and that its exculpatory clause is valid.

GBL AP-300,655

The housetrailer of Air Force Staff Sergeant James L. Harrison was transported by Chandler from Almagordo, New Mexico, to Greenfield, Tennessee, under GBL AP-300,655. On pickup, Chandler inspected the mobile home and prepared a premove inspection form on which some minor surface damage was noted. Marked with a check was the printed designation "good," the highest rating on the form, for the condition of the tires. Also, there was a statement that the mobile home did not appear to be overloaded.

On arrival at destination, extensive additional damage was noted and an estimate of the cost of repairs was secured. Chandler concedes that a prima facie case for the liability of Chandler has been established. Chandler contends, however, that the damage was caused by the defective condition of the tires, which were a part of the mobile home and the property of the service member.

Chandler asserts, therefore, that the damage was the result of the act of the shipper, one of the exceptions to common carrier liability.

In an Engineer's Inspection Report, the probable cause of the damage was stated to be an: ". . . imbalance on the right end of the trailer. This imbalance was a result of the numerous tire failures on that side. The imbalance caused a definite sway or fishtail effect on the rear portion of the trailer." In a written statement, the owner stated that he followed the mobile home in his car and Chandler followed a route which involved several stretches of construction. Chandler's driver left an interstate highway to take an out-of-the-way, narrow, two-lane highway in order to drop his family, which had accompanied him. During the transportation, the mobile home had 11 blowouts and four flat tires. A memo in the file by the Air Force claims officer indicates that because of the width of the mobile home and the narrowness of the two-lane highway, Chandler's driver was required to leave the road on numerous occasions to avoid approaching vehicles. The claims officer also noted that "all flat tires occurred on the right axles (side which is most likely to leave road)." A statement by Chandler's driver indicated that: "Tire failure was mostly due to conditions over which we had to travel, the roads, etc. The flats were not caused by overloading, but rather by nails we picked up, this type and the same sort."

Once a prima facie case of damage in transit has been established, the carrier is obliged to establish that the damage was caused solely by one of the five exceptions recognized at common law, such as an act or fault of the shipper. Chandler Trailer Convoy, Inc., 55 Comp. Gen. 1209, 1213 (1976). This defense must be established by affirmative evidence--mere conjecture is not sufficient. Karabagui v. The Shichshenny, 123 F. Supp. 99 (1954), affirmed 227 F.2d 348 (1957; Joseph Toker v. Lehigh Valley R., 97 A.2d 598 (1953).

We previously denied Chandler's claim on the grounds that Chandler had not shown that the tires were defective and had not, therefore, shown that the damage was due to an exception to carrier liability. We also held, citing the decision in National Trailer Convoy, Inc., B-199156, Mar. 5, 1981, 81-1 C.P.D. ¶ 168, that a tire is not shown to be defective merely because it fails.

Chandler again contends that it is not liable because the damages resulted solely from the multiple tire failures, but Chandler has neither alleged, nor presented any evidence

of, defect in the tires. On the contrary, Chandler's premove inspection report shows that the tires were good and that the mobile home was not overloaded. The statement of Chandler's driver shows that the tire failures were due mostly to road conditions, nails picked up and, apparently, other things of the same sort. The statement of Staff Sergeant Harrison indicates that there was wire in the tires. As noted by the Air Force claims officer, it is significant that all 15 tire failures occurred on the right side of the mobile home, 11 of which were replaced by presumably new tires, some of which also failed. There is no evidence of a single tire failure on the left side of the mobile home.

The evidence, therefore, tends to establish that the damage was caused by a combination of road conditions and the manner in which the mobile home was transported.

Since the damage in transit has not been shown to have resulted solely from an excepted cause, we affirm our prior decision denying the claim of Chandler.

GBL No. K-0,997,949

Chandler picked up the mobile home of Staff Sergeant Rodney S. Patterson, United States Marine Corps (USMC), at Jacksonville, North Carolina, for transportation to Brunswick, Maine, under GBL No. K-0,997,949. At some point near Harrisburg, Pennsylvania, the main framework under the trailer was bending and buckling over the axle. Chandler contacted Sergeant Patterson, who authorized the installation of a third axle and reinforcement of the framework. Sergeant Patterson paid the bill of $2,814 for these repairs. Chandler's driver resumed the move, but terminated it shortly thereafter because the unit had deteriorated to the point where it could no longer be transported. The driver abandoned the unit at a truck stop in Pittston, Pennsylvania. The USMC then issued a corrected GBL terminating the shipment because of "trailer disintegrating." Sergeant Patterson transferred title to the trailer to the owners of the truck stop in satisfaction of their claim for storage.

Sergeant Patterson filed a claim with the USMC for reimbursement of $2,814 for the cost of repairs and a claim for the value of the mobile home. The claim for repairs was denied and Sergeant Patterson was awarded $8,685 for the value of the mobile home. The USMC claimed reimbursement of the damages from Chandler. On the failure of Chandler to make a voluntary reimbursement for the damage, the amount of

$8,685 was recovered by the USMC by setoff from amounts subsequently due to Chandler.

It appears that the setoff was effected in two installments. An initial installment of $2,800 was recovered, and, by letter of October 8, 1982, Chandler claimed refund of this amount in the mistaken belief that the setoff had been taken for the in-transit repairs. On November 4, 1982, an additional amount of $5,885 was collected by setoff and Chandler amended its claim to $8,685 by letter of December 8, 1982, addressed to our Claims Group. This letter was not in the record before us during our previous consideration of the claim. Consequently, under the belief that Chandler's claim was for refund of amounts recovered for the repairs in transit, the claim was denied in our prior decision on the grounds that the amount of the in-transit repairs had not been recovered from Chandler and Chandler had not questioned the propriety of the $8,685 recovered for the value of the mobile home.

In connection with the request for reconsideration, Chandler has furnished a copy of its letter of December 8, 1982, amending the claim to question the propriety of the $8,685 setoff.

First, Chandler does not concede that the government has established a prima facie case because the mobile home was not in good condition at origin and, second, Chandler contends that, if a prima facie case has been established, Chandler is not liable because "the damages were occasioned because the main framework under the trailer was bending and buckling, necessitating the Marine Corps to terminate that shipment because the trailer was disintegrating." Chandler also contends that the structural defects were not open and apparent to ordinary observation, and that the carrier is not required "to jack up a mobile home and use a flashlight to inspect the undercarriage nor does the carrier have to climb up on top of the mobile home to inspect the roof for cracks or leaks in the cool seal, etc." Finally, Chandler contends that there is no evidence of carrier negligence.

The USMC contends, first, that the evidence shows receipt by the carrier in good condition, delivery by the carrier in damaged condition, and the amount of the damages, which establishes a prima facie case. The USMC next contends that Chandler has not presented any evidence of structural defects, but infers the existence of structural defects from the results.

In order to established a prima facie case, it is not necessary to show that the shipment was in good condition at origin, but only that it was in better condition at origin than on delivery at destination and the amount of the damages. Silver Lining v. Shein, 117 A.2d 182, 186 (1955). The copy of the premove inspection record signed by the Chandler driver shows only a small buckle and small dent on the right side, small dents in front, shower door broken inside and the A-frame behind the hitch was bent and rusty. A personal property inspection record prepared by the USMC states that: "Trailer is in satisfactory condition at origin. Should be no problem." On delivery at the reconsigned destination, the mobile home was considered by the USMC claims office as a total loss and allowed the owner the full value. Therefore, the record establishes a failure to deliver the mobile home in the same condition as received at origin and the amount of the damages, which constitutes a prima facie case.

In defense, Chandler contends that the damage was the result of latent structural defects in the mobile home. However, the only latent defect that has been shown was defective lug threads on one wheel hub, which permitted one wheel to come off twice. Chandler has neither alleged nor shown that the damage resulted from this latent defect. The contention that the structure was defective is based on inference from the fact of the damage, which does not satisfy the burden of proving the exception by affirmative evidence. Karabagui v. The Shechshenny, supra; and Joseph Toker v. Lehigh Valley R., supra.

Since Chandler has not shown the damage in transit to have resulted solely from premove latent defects in the mobile home, Chandler has not shown that the damage resulted solely from an excepted cause so as to overcome the prima facie case of liability. We therefore affirm our decision denying Chandler's claim.

Finally, Chandler claims salvage in the event we affirm our decision disallowing the claim. However, Chandler has presented no evidence of the amount of salvage. A claimant bears the burden of furnishing evidence clearly and satisfactorily establishing its claim and all incidental matters to establish the clear legal liability of the United States and the claimant's right to payment. See 31 Comp.

Gen. 340 (1952) and 18 Comp. Gen. 980 (1939). Chandler has failed to sustain the burden of evidence.

Milton J. Socolar

Acting Comptroller General
of the United States