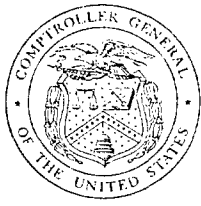


TR 12613

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DECISION



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

FILE: B-197120

DATE: January 23, 1980

MATTER OF: Thurston Motor Lines, Inc.

DIGEST:

Where ^[request for review of settlement *Involving Carrier Liability*] is based upon an argument not previously considered which is unsubstantiated by facts on record, settlement must be sustained.

Thurston Motor Lines, Inc. ^{DLG-03670} (Thurston) has requested review of our Claims Division's settlement dated October 27, 1978, (Claims Division file No. Z-2356568(2)) in which Thurston was found liable to the Government for the loss of electrical instruments valued at \$24,529.64. Specifically, Thurston submits that the Claims Division misunderstood a fact in the record which, if considered properly, might have affected the outcome of the settlement. For the reasons stated below, the settlement is sustained.

The record indicates that four pieces of freight containing electrical instruments were tendered under Government bill of lading No. F-2478759 to East Texas Motor Freight, Inc. (ETMF), in Abilene, Texas, on January 30, 1970, and interlined to Thurston on February 16, 1970, for delivery to final destination. At the time of interlining it was noted that a 377-pound carton was missing. On February 18, 1970, the shipment was delivered to the Coast Guard Aircraft and Supply Center in Elizabeth City, North Carolina, ^{DLG-03671} but was received only after the Coast Guard annotated Thurston's freight bill No. 30-356302 "one box short wt. 377 lb."

By letters dated February 26 and March 6, 1970, the Coast Guard requested Thurston to take tracer action on the missing carton. The carton was not found and a \$24,529.64 bill, representing damages for the loss, was presented to Thurston on October 26, 1970, and again on September 15, 1971. Thurston acknowledged the claim by letter dated June 13, 1973, and formally declined payment in a letter dated October 1, 1975.

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The Claims Division determined, and we agree, that these facts establish a prima facie case of negligence against Thurston in accordance with the standards recognized in Missouri Pacific RR. v. Elmore & Stahl, 377 U.S. 134 (1964). In rebuttal of the Government's case, Thurston posited several contentions, all of which were rejected as without merit since they were unsupported by evidence on the record. Consequently, Thurston was found to be liable for the loss under the terms of section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11) (1976).

Thurston does not question the conclusions reached in the settlement but submits that one of its arguments was not addressed due to the Claims Division's misunderstanding of a material fact. The relevant portion of the settlement, found on page three, states as follows:

"The file does show that the building where Thurston kept its records was partially destroyed when a small plane crashed into it. It is understandable that Thurston has no record of receiving the notices of shortage. However, this does not rebut the substantial evidence that timely notice was made."

In its petition for review, Thurston explains that the building and records destroyed in the crash actually belonged to the Coast Guard and not, as indicated in the settlement, to Thurston. Thurston further states that this occurrence was not intended as support for its contention that timely notice of the loss was never received. Rather, it was submitted to show that Thurston should be relieved from liability for the loss on the ground that the destroyed records might have been helpful in locating the lost equipment.

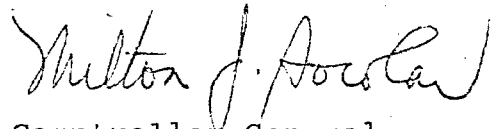
This argument is without merit and must be rejected for the same reasons relied upon in the claim settlement. Since the Government has made out a prima facie case of carrier negligence against Thurston liability can be avoided only if Thurston sustains the burden of affirmatively proving lack of negligence and that the loss was caused by one of the exceptions

recognized in Missouri Pacific RR. v. Elmore & Stahl, supra. Thurston has not produced any evidence, beyond mere supposition, that an effective investigation was prevented by the destruction of the records.

The clarification of the facts concerning the plane crash is inconsequential since the mere assertion that useful information might have been contained in the unavailable records is not by itself sufficient to warrant Thurston's release from liability.

Furthermore, while a carrier will be absolved from liability for a loss occasioned by an act of God, Thurston here contends only that a thorough investigation was precluded by the crash and not that the crash caused the loss. Thus, the presumption of carrier negligence remains as to the loss itself.

We thus must sustain the disallowance by our Claims Division.



For the Comptroller General
of the United States