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DECISION

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

FILE: B-213835 DATE: May 10, 1984

MATTER OF: Jet Forwarding Inc.

DIGEST:

Where it cannot be established clearly whether certain losses and damages to household goods occurred while the shipment was in the custody of the carrier or the government, which acted as a participating carrier, the Navy should compromise the claim against the carrier for 50 percent of the carrier's contractual liability contingent upon the carrier's prompt settlement at this amount, as provided in an agreement between the military services and representatives of the carrier industry.

Jet Forwarding, Inc. has appealed from our Claims Group's denial of its claim for a refund of $222.40 in connection with a set-off of $444.80 initiated by the Department of the Navy for damages to the household goods of a petty officer during shipment from Guantanamo Bay, Cuba to Rochester, New York.

We find that Jet's claim should be paid in the amount of $156.40.

Upon receipt of a government bill of lading, a Jet agent packed and picked up the household goods and delivered them to a vessel provided by the government. The government subsequently delivered the goods to another Jet agent in the United States, and the goods were forwarded to Rochester, where they remained in storage until delivery to the owner's residence. At the time of delivery and during the next few days, losses of and damages to a number of items were discovered, and Jet was so notifed.

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The Navy, after paying the owner $2,177.45, demanded $444.80 from Jet, which represents the agency's calculation of Jet's contractual liability. Jet, however, offered to pay $221.30, in apparent reliance on a rule that when the damage cannot be determined to be solely the responsibility of the carrier or the government, each must assume 50 percent of the liability for the losses and damages.[1] The Navy refused the offer, and set-off the full $444.80. Jet then submitted its claim to our Claims Group for a refund of $222.40, which the Claims Group denied.

A shipment such as occurred here, where the carrier provides the land transportation and the government provides the ocean transportation, is called a Code 5 shipment. Under Item 32 of the Military Basic Tender, the carrier is relieved of liability for loss or damage when it can reasonably be established that the loss or damage occurred while the shipment was in the custody of the government. Because many times, in Code 5 shipments, it cannot be clearly established in whose custody the loss or damage occurred, the military services have agreed with respresentatives of the carrier industry on a compromise known as the 50/50 rule for Code 5 shipments. The Air Force has acknowledged this rule in Air Force Regulation 112-106-62, dated July 1, 1983, and the Navy, which has not yet incorporated the agreement into its own regulations, has advised us informally that it follows the Air Force Regulation. The Air Force describes the rule as follows:

> "In situations in which an accurate determination cannot be readily made whether loss or damage to a Code 5 shipment . . . occurred while in the custody and control of the government or while in the custody and control of the carrier, the government (Air Force) will offer to accept a compromise of 50 percent of the amount the government (Air Force) determines to be due. The government

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[1] Jet's offer, of course, was slightly less than one half of $444.80.

> (Air Force) will endeavor to correctly assess liability based on correct weights and values of items and costs of repair. The offer of compromise is predicated upon prompt acceptance and payment of the government (Air Force) offer."

Under this agreement, the government gives up its right to insist the carrier carry the full burden of proving freedom from fault in return for the carrier giving up its right to contest the determination of the value of the claim; the expected result is a saving in administrative costs. As can be seen, when the rule is applicable, it is incumbent upon the government to inform the carrier of its liability as established and then offer to reduce the amount by 50 percent for prompt payment.

The Navy, which uses the 50/50 rule for Code 5 shipments, did not in this case offer to apply the rule apparently because Jet failed to present any evidence rebutting its liability. Therefore, the Navy, in rejecting Jet's offer even though the record contains no evidence as to when and in whose custody the losses and damages largely occurred, relied on the general presumption of carrier liability that arises from a common law rule that a carrier, although not an absolute insurer, is liable without proof of negligence for damages to property it transports unless it can show that it was free from negligence and that the damage was due to an excepted cause relieving it of liability. See Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134 (1964); Chandler Trailer Convoy, Inc., B-193423; B-211194, January 5, 1984.

We believe the 50/50 rule applies here, at least to some of the damage. It is only where the entire shipment is handled by commercial carriers that the presumption of carrier liability should be applied, since the carriers have sole custody of the shipment during transport; in that case, damage to goods delivered to the origin carrier in good condition most probably occurred while in that or another carrier's possession. When the government, however, is in effect a participating carrier, so that the damage during shipment just as likely occurred while the

government had the goods, and when no evidence exists to establish the liability of either party, it has been decided to be in the government's interest that the 50/50 rule should replace the presumption of liability,[2] so long as the carrier pays promptly.

Moreover, as we understand the 50/50 rule, it applies when it is impossible to determine how or where the damage or loss occurred. We therefore do not believe it was reasonable for the Navy to have expected Jet to furnish evidence that the firm was not liable before invoking the rule; if Jet could have done so, the firm would have incurred no liability since it thereby would have rebutted the common law presumption.

As pointed out above, however, the 50/50 rule applies only in the absence of evidence indicating in whose custody the damage or loss occurred. We note that on the owner's claim form, it is stated that one couch and two chairs had to be reupholstered because corrugated wrappings had been "used backwards" and had crushed the velvet. The Navy determined the carrier's liability for this damage to be $132. As the shipment was packed by an agent of Jet, we believe the firm should be held liable for that amount.

Accordingly, the government should retain $132.00 of the total of $444.80 that it has set-off and refund Jet 50 percent of the remainder ($312.80), which is $156.40.

Shelton J. Gordon

Acting Comptroller General
of the United States

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[2]We note that Defense Acquisition Regulation § 7-1601.14 sets out a clause which provides that the origin and destination carriers will equally share liability for damage on loss, absent evidence that fixes the responsibility of one of them.

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