R. Feldman
Transportation

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DECISION

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

FILE: B-187627 DATE: January 14, 1977

MATTER OF: Sea-Land Service, Inc.

DIGEST: 1) Prima facie case of liability of common carrier by water for goods shipped through Panama Canal is established when shipper shows that cargo was received in good order and condition at origin and arrived in damaged condition at destination. To escape liability carrier must show that loss or damage was caused by an Act of God, the public enemy, inherent vice of the goods or fault of shipper and that it was free of negligence.

2) Government agency may exercise its common law right of setoff if prima facie case of carrier liability is established. Setoff may be exercised by the Government before liability is judicially established. A review of a setoff by the United States is within jurisdiction of Court of Claims. 28 U.S.C. § 1503 (1970).

3) Condition 7 in Government bill of lading constitutes a waiver of the limitation period in a commercial bill of lading regarding time within which notice of loss or damage or suit or claim regarding the same must be instituted.

4) The Government's common law right of setoff is not extinguished by 49 U.S.C. § 66. The right of the Government to deduct from the payment of freight charges is not limited to overcharges.

This decision is in response to a claim submitted by Sea-Land Service, Inc. (Sea-Land), for $91,665.40 in earned ocean freight which was withheld by means of setoff against a cargo damage claim of the United States. Sea-Land protests the Government's withholding of the sum equal to its cargo damage claim, and argues that the Government has no right of common law setoff.

Sea-Land, a common carrier by water, received for transportation in March 1972 two shipments of palletized, canned, dried nuts loaded into three Sea-Land containers. The shipments were

transported from Brooklyn, New York, to the Defense Depot, Tracy, California, and to the Naval Supply Center, Alameda, California, under Government bills of lading (GBLs) Nos. F-2715761 and F-2715762. These shipments transited the Panama Canal and were delivered to the Government in California on April 20, 24, and 25, 1972. Both shipments were rejected by the consignees; rejection was predicated upon evidence of moderate to extensive rust (moisture damage) to the exterior of the cans, rendering the cargo unfit for military distribution.

The GBLs were issued by Sea-Land March 20, and 30, 1972, to cover the two shipments of edible nuts from G & R Packing Co. (G & R) in Brooklyn, New York, for Aster Nut Products, Inc. (Aster), of Newark, New Jersey, a Government contractor.

The Defense Contract Administration Services Region (DCASR) for New York reports that in the process of canning, these nuts are packaged by Aster in the cans in a dry condition at room temperature. The cans are packed in the shipping cases at room temperature and then placed on pallets and shipped to G & R in closed vans. At G & R the shipping cases are taken off the prime contractor's pallets and placed on military pallets. All of this work is done indoors in a covered area and at room temperature.

G & R packed and sealed 34 pallets in Sea-Land's container #39371 on March 19, 1972, and the shipment was picked up by Sea-Land at G & R on March 20, 1972, under GBL No. F-2715761. The shipment was lifted aboard Sea-Land's S.S. Baltimore which sailed from Elizabeth, New Jersey, on March 24, 1972 (voyage 86W); it was delivered by Sea-Land's agent to the Tracy Defense Depot on April 20, 1972, where it was rejected to the carrier.

G & R packed 30 pallets in Sea-Land's container #33435 and 20 pallets in container #67774 on March 29, 1972, and the shipment was picked up by Sea-Land from G & R on March 30, 1976, under GBL No. F-2715762. The shipment was lifted aboard Sea-Land's S.S. Seattle which sailed from Elizabeth, New Jersey, on April 3, 1972 (voyage 235W); it was delivered by Sea-Land's agent to the Alameda Facility Warehouse on April 24 and 25, 1972, where it was rejected to the carrier.

Listed below is the temperature and precipitation from March 16 through 20, 1972, at G & R, Brooklyn, New York, when the shipment moving under GBL No. F-2715761 was packed:

DATE	TEMPERATURE	PRECIPITATION
16 Mar 72	51° - 36°	Rain
17 Mar 72	52° - 38°	1.20%
18 Mar 72	51° - 41°	.02%
19 Mar 72	53° - 40°	.20%
20 Mar 72	51° - 36°	.20%

Listed below is the temperature and precipitation from March 27 through 31, 1972, at G & R, Brooklyn, New York, when the shipment moving under GBL No. F-2715762 was packed:

DATE	TEMPERATURE	PRECIPITATION
27 Mar 72	46° - 31°	No Rain
28 Mar 72	48° - 27°	No Rain
29 Mar 72	58° - 35°	No Rain
30 Mar 72	43° - 40°	No Rain
31 Mar 72	46° - 40°	No Rain

The record discloses that U.S. Department of Agriculture (USDA) Inspectors at origin accepted the shipments as meeting the contract requirements including packaging, packing, and condition at the time of shipment. Furthermore, the USDA examination worksheets reveal that all cans were found to have no defects and were accepted by the Government without exception. And in a letter dated June 27, 1972, Sea-Land agrees that "the inspection by the Department of Agriculture . . . would appear to rule out [preshipment damage.]"

A Discrepancy in Shipment Report dated June 30, 1972, prepared at destination by the consignee on GBL No. F-2715761, indicates that:

> "Shipping containers (cases) appeared to have been water-soaked. Cases were wrinkled and damp. Cans showed deep pitting rust especially in top two (2) layers of each pallet."

A Discrepancy in Shipment Report dated May 1, 1972, prepared at destination by the consignee on GBL No. F-2715762, indicates that:

"Inspection by U.S. Army Veterinary Detachment determined that the overwhelming majority of cans were corroded from water. Many cases were damp and beginning to mildew. The entire shipment of 2000 cases of mixed nuts was rejected.

* * * * *

"Apparent Cause: Water Soaked in Transit."

The shipments were rejected by the military because recanning, reconditioning and repacking of the product by the Government was not feasible since the operation would have been very costly and the yield of usable nuts unpredictable. In a letter dated May 4, 1972, to G & R, Sea-Land stated that "The military has advised they cannot use the cargo due to the necessity for them to store it approximately 9 months prior to distribution . . ."

A clean bill of lading is prima facie evidence that a shipment was received at origin in good order and condition. See States Marine Corp. of Delaware v. Producers Coop. Packing Co., 310 F.2d 206, 211 (9th Cir. 1962). At common law, a common carrier by water was responsible for the safe arrival of the cargo, unless the loss or damage was caused by an Act of God or of the public enemy, or by inherent vice of the goods, or the fault of the shipper, and even when the loss was caused by one of these exceptions, the carrier had to be free from negligence. Propeller Niagara v. Cordell, 62 U.S. (21 How.) 7, 23 (1858). When the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that the cause would not have produced the injury but for the carrier's negligence in failing to guard against it. Schnell v. The Vallescura, 293 U.S. 296 (1934). However, when the cause for the injury for which the carrier is prima facie liable is not shown to be an excepted peril, and a cargo which had been received in good condition is damaged by causes unknown or unexplained, the carrier is subject to the rule applicable to all bailees that such evidence makes out a prima facie case of liability. The Vallescura, supra, at 305.

Sea-Land contends that the damage to the shipments transported under GBL No. F-2715761 and GBL No. F-2715762 was caused by an inherent vice; i.e., condensation. More precisely, in a letter dated June 27, 1972, to the Department of the Army, Sea-Land states that:

> "A thorough survey has established that the cans were wet but that the cases had not been externally wetted. Condensation losses of this type occur in rare, freakish situations when canned goods items are loaded under unusually humid conditions and then subjected to sudden chilling due to temperature change. It takes an unusual combination of the above factors to accomplish such internal damage and there is no practical way to guard against such an occurrence other than to avoid packing and stowing under such conditions when unusually warm moist air is present. Once loaded, of course, it is thereafter impossible to control the onset of any sudden temperature drop. It is unlikely that an accident of this type would repeat in the near future."

The record establishes that the cans were in good order and condition upon receipt at origin. This fact is documented by the USDA examination of the cargo prior to shipment and by the clean bills of lading. Furthermore, the record strongly indicates that the climatic conditions existing at Aster and G & R when the nuts were packed in cans and cases and loaded in the containers were not conducive to the creation of condensation. Therefore, Sea-Land's assertion "that losses of this type occur . . . when canned goods items are loaded under unusually humid conditions and then subjected to sudden chilling due to temperature change," is questionable.

While Sea-Land asserts that condensation (cargo sweat) caused the damage and while this conclusion is stated in survey reports submitted by Sea-Land, other evidence in the record indicates that the cartons were soaked during transit and showed signs of mildew. Furthermore, the Department of the Army states in its administrative report that:

> ". . . the carrier's personnel did state that they are having and will have, with the present equipment, problems of condensation. . . . The carrier was fully aware of the nature of the commodity and the shipment was made without exceptions."

Where there is a conflict between contentions of the carrier and the report of the administrative agency, the rule of this Office is to accept the report of the administrative agency as correct in the absence of conclusive evidence to the contrary. 51 Comp. Gen. 541, 543 (1972). In any event, since the goods were delivered to the carrier in good condition and arrived at destination in damaged condition, a prima facie case of carrier liability has been established and Sea-Land has not rebutted it. See The Vallescura, supra, at 305.

Sea-Land argues that the decisions in United States v. Isthmian Steamship Co., 359 U.S. 314 (1959), and in Grace Line v. United States, 255 F.2d 810 (2d Cir. 1958), preclude the Government from exercising its common law right of setoff. Essentially, Sea-Land's argument is as follows:

> "It is abundantly clear that the position of the Government Finance Center is that, by withholding and applying ocean freight earned and due Sea-Land against our alleged indebtedness for cargo damage loss, there results a discharge of 'mutual debts' which constitutes 'payment'. In this respect, the General Accounting Office is urged to review the decision by the Court of Appeals for the Second Circuit in Grace Line, supra, wherein the Court stated (255 F.2d at 813):
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> > 'In other words, the attempted set-off must be a legally enforceable claim; and the fact that the Comptroller General has decided the claim in favor of the Government ex parte by withholding the amount thereof from a payment justly due to a creditor of the United States neither constitutes a payment of and discharge of the debt nor does it stop the running of the applicable Statute of Limitations against the government claim in alleged satisfaction of which the Comptroller General takes this unilateral action. Here the period of limitations had plainly run.'"

Both Isthmian and Grace Line were suits in admiralty which rested partly on the proposition that admiralty practice did not permit private parties to defend by setting off claims arising

out of separate and unrelated transactions between the parties. The courts reasoned that the Government could not offset against the libelant's claim an amount owing to the Government under an earlier unrelated transaction. With the merger of the admiralty rules of practice into the Federal Rules of Civil Procedure in 1966, Rule 13 of the Federal Rules of Civil Procedure permits the assertion of claims arising from independent transactions as permissive counterclaims. Therefore, at the judicial level, the Government's cargo damage claim against Sea-Land could be asserted as a permissive counterclaim. Both courts also held that the setoff of one claim against another does not constitute "payment" of that creditor's claim against the United States under 31 U.S.C. § 71 (1970). (This statute gives the General Accounting Office the power to settle and adjust all claims by or against the United States.) While we agree that a setoff of one claim against another does not constitute "payment" under 31 U.S.C. § 71, the Supreme Court has recognized the right of a Government agency to exercise its common law right of setoff. A review of a setoff by the United States is within the jurisdiction of the Court of Claims. 28 U.S.C. § 1503 (1970).

In United States v. Munsey Trust Co., 332 U.S. 234 (1947), the Supreme Court states at 239-40:

> "The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor in his hands, in extinguishment of debts due him.'
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> * * * * *
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> "[The power of set off is given] to the Comptroller General, subject to review [by the Court of Claims.]"

Furthermore, the United States may make a setoff before judgment. See United States v. American Surety Co. of N.Y., 158 F.2d 12 (5th Cir. 1946).

Sea-Land asserts that the Government's cargo damage claim is time barred and therefore under Grace Line is not a "legally enforceable" claim. Sea-Land states that:

> ". . . Having failed to prove judicially its claim for cargo damage within the statutory period of limitations, Sea-Land respectfully submits that the $91,665.40 of earned ocean freight, held as 'security' against the Government's time-barred claim, be returned forthwith."

Apparently Sea-Land is relying on the one year time limitation for commencement of legal action contained in its bill of lading. This bill also incorporates the Carriage of Goods by Sea Act which contains a similar provision. Consequently Sea-Land argues that the Government may not set off its cargo damage claim against the carrier's current ocean freight billings.

In Grace Line the goods moved under a commercial bill of lading which provided that "the carrier shall be discharged from all liability in respect of . . . every claim with respect to the goods unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered . . ." The bill also incorporated by reference the Carriage of Goods by Sea Act which included a similar time bar.

The cargo involved in this case moved under Government bills of lading which on the back under condition 7 provide that:

> "In case of loss, damage, or shrinkage in transit, the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the carrier or the period within which claim therefor shall be made or suit instituted."

Condition 7 in the Government bill of lading constitutes a waiver of the limitation period in the commercial bill of lading. See United States v. Gulf Puerto Rico Lines, Inc., 492 F.2d 1249 (1st Cir. 1974). As a result, the Government is not subject to a one year limitation within which it may commence a suit for loss and damage and to that extent the holding in Grace Line is no impediment to the setoff. Moreover, in an action against the United States any claim of the United States "that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted

only by way of offset . . ." 28 U.S.C. § 2415(f) (1970). Therefore, in a suit by Sea-Land, the cargo damage claim against Sea-Land, even if considered time-barred, could be asserted against it by way of offset. Thus, unlike the claim in Grace Line, this claim is "legally enforceable" and therefore the proper subject of common law setoff under Munsey Trust.

Sea-Land also argues that the right of the Government to make any deduction from the payment of freight charges is limited to overcharges defined in Section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. § 66. However, the Government's common law right of setoff is not extinguished by that statute. Burlington Northern, Inc. v. United States, 462 F.2d 526 (Ct. Cl. 1972).

We note, however, that the Government's setoff of the $91,665.40 claim included $1,075 in freight charges collected by Sea-Land on the shipment moving under GBL No. F-2715761. Sea-Land clearly is entitled to these freight charges because it delivered the cargo to destination. See Alcoa Steamship Co. v. United States, 338 U.S. 421 (1949); United Van Lines, Inc. v. United States, 448 F.2d 1190 (D.C. Cir. 1971).

In these circumstances, Sea-Land is entitled to freight charges of $1,075, if otherwise correct; the balance of the claim must be and is disallowed.

Deputy Comptroller General
of the United States