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DECISION



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

FILE: B-206161

DATE: July 20, 1982

MATTER OF: Southern Pacific Transportation Company

DIGEST:

Legal basis exists for Army to set off a damage claim, arising out of train derailment in May 1975, against monies currently due rail carrier for transportation services, notwithstanding claim is time-barred by provisions of commercial bill of lading and six-year statute of limitations governing institution of suit arising out of contract.

The Department of the Army, U.S. Army Finance and Accounting Center, Indianapolis, Indiana, requests advice under the Federal Claims Collection Standards, 4 C.F.R. § 104.4 (1982), on the question of whether the Army can set off a damage claim, arising out of a train derailment on May 13, 1975, against monies currently due the Southern Pacific Transportation Company.

The carrier's position, that the claim is time-barred, is based on section 2(b) of the terms and conditions of the commercial bill of lading. That section provides that no carrier shall be liable for damage where suit is not instituted within two years and one day from the day when notice in writing is given by the carrier that the claim is denied. We agree with the Army that the limitation period in the commercial bill of lading does not prevent setoff to recover on its claim.

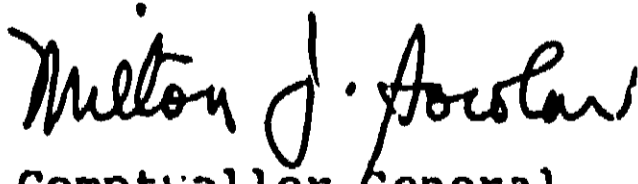
The shipment was transported on a Government bill of lading (GBL). GBL K-5164963 was issued on May 6, 1975, to transport a shipment of guided missiles from California to Alabama. Among its terms was the provision that the GBL was governed by Title 4, Part 52 of the Code of Federal Regulations. Section 52.51(g) of 4 C.F.R. (1975) provided, in part:

"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 to period within which claim therefor shall be made or suit instituted. * * *

This provision, and a similar one now in 41 C.F.R. § 101-41.302-3(g), are known historically as Condition 7 of the GBL.

We held in 56 Comp. Gen. 264 (1977) that Condition 7 constitutes a waiver of the limitation periods in the commercial bill of lading, and that the latter present no impediment to the exercise of the Government's common law right of setoff. See United States v. Mursey Trust Co., 332 U.S. 234 (1947). The soundness of the decision was affirmed and the principle was extended in IML Freight, Inc. v. United States, 639 F.2d 676 (Ct. Cl. 1980). There, the question was presented of whether the Government could set off to recover on a loss or damage claim arising out of contract where suit was time-barred by the six-year period of limitations in 28 U.S.C. § 2415(a) (Supp. III 1979); the Court of Claims held that under 28 U.S.C. § 2415(f) (1976) the Government can administratively set off a timebarred claim for freight loss or damage and assert setoff as an affirmative defense in the event of suit by the carrier.

We conclude therefore, that the Army may legally recover on its damage claim by exercising the Government's common law right of setoff against monies currently due Southern Pacific, although we express no opinion concerning the merits of the claim.

for 
Comptroller General
of the United States