DECISION

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

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FILE: B-185784

DATE: JUN 25 1976

MATTER OF: Chandler Trailer Convoy, Inc.

DIGEST:

1. Mobile home delivered to carrier in good condition, delivered to consignee in damaged condition, and ascertainment of amount of damage establishes prima facie case. Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134, 138 (1964).

2. Mobile home carriers are subject to Carmack Amendment, 49 U.S.C. 20(11) (1970).

3. At common law common carrier could not escape liability by showing absence of negligence. See cases cited.

4. Cases involving perishable goods apply to durable goods.

5. Carrier's tariff item excluding it from liability is ambiguous, and appears to be rule exempting carrier from own negligence, and therefore in violation of 49 U.S.C. 20(11) (1970).

6. Carrier has burden of proof to show that inherent defect was sole cause of damage.

Chandler Trailer Convoy, Inc. (Chandler), has requested review of a settlement issued by our Claims Division on November 28, 1975. In the settlement the Claims Division disallowed Chandler's claim for a refund of $1,942.66, which the Government as a subrogee collected by setoff for damage to a mobile home owned by a member of the military and transported by Chandler under Government bill of lading No. H-5671932.

The mobile home was picked up by Chandler on January 21, 1974, at Huachuca City, Arizona, and delivered in a damaged condition to its owner in Scottsburg, Indiana, on February 1, 1974. The Pre-Move Inspection Record, prepared by the carrier's

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representative, shows that the mobile home was in good condition at origin, with the exception of some screws loose and missing on the left side. Since the mobile home was delivered to the carrier at origin in good condition and to the owner-consignee at destination in a damaged condition, the ascertainment by the consignee of the amount of the damage ($1,942.66) established the remaining element necessary to create a prima facie case of carrier liability. Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134, 138 (1964). On the basis of the prima facie case, $1,942.66 was administratively set off from money otherwise due the carrier.

Chandler does not deny that the mobile home was damaged at destination, but alleges (1) that the Missouri Pacific case, cited above, does not apply to the transportation of mobile homes, (2) that the damage to the mobile home occurred as the result of normal wear and tear and/or structural or mechanical failure and not as a result of its transportation, and (3) that the mobile home was not damaged by collision.

Chandler is a motor common carrier whose main business is the transportation of mobile homes. As a common carrier, Chandler is subject to Section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11) (1970), commonly called the Carmack Amendment, made applicable to motor carriers by Section 219 of the Act, 49 U.S.C. 319 (1970). See National Trailer Convoy, Inc. v. United States, 345 F.2d 573 (Ct. Cl. 1965). It provides in pertinent part that a carrier "shall issue a receipt or bill of lading [for the property received], and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it * * * and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier * * * from the liability imposed * * *."

The meaning of the Carmack Amendment is explained in L.E. Whitlock Truck Service, Inc. v. Regal Drilling Co., 333 F.2d 488 (10th Cir. 1964), at page 491:

> "At common law a common carrier undertook to carry the shipment safely, and it was liable for all loss or injury excepting only that due to acts of God, public enemy, and those arising

from the inherent nature of the goods transported or resulting from the fault of the shipper. It was also a rule of common law that as to these excepted causes of damage the carrier could nevertheless be held liable if it were negligent. The carrier was liable for damages whether negligent or not if the loss was not due to the excepted causes. Therefore a carrier could not escape liability by a showing of the absence of negligence on its part. Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co., 270 U.S. 416, 46 S.Ct. 318, 70 L.Ed. 659 [1926].

"In Secretary of Agriculture v. United States, 350 U.S. 162, 76 S.Ct. 244, L.Ed. 173 [1956], the Court considered a similar question and found that the Interstate Commerce Commission was prevented from approving tariffs which limited the common law liability of the carrier for damage. It has been held that a prima facie case has been made under the Carmack Amendment when the shipper shows that the shipment was in good condition when delivered to the carrier and further that the carrier could not escape liability if the goods are delivered in damaged condition, by showing that it was not negligent in handling the shipment. Thus the Carmack Amendment codifies the common law rule of the carrier's liability, and the federal law applies. Missouri Pacific R.R. Co. v. Elmore & Stahl, 84 S.Ct. 1142 (1964) [377 U.S. 134 (1964)], Secretary of Agriculture v. United States, supra. The Supreme Court has held that a carrier is not an absolute insurer, but is liable if the shipper makes a prima facie case and the carrier does not meet its burden to show both its freedom from negligence and that the loss was due to one of the causes excepted by the common law rule. The cases involving perishable goods are not distinguished from those where durable goods are transported. Missouri Pacific R.R. Co. v. Elmore & Stahl, supra.

> "Thus to establish the carrier's liability, it is necessary only for the claimant to show the carrier's receipt of the shipment in apparent good order, and the delivery or release of the shipment by the carrier in damaged condition. This being shown, the prima facie case is established and the burden is on the carrier to prove that the shipment was not delivered in good order, that it was delivered by it in good condition, or that the excepted causes were applicable, and it was free of negligence. United States v. Mississippi Valley Barge Line Co., 285 F.2d 381 (8th Cir. [1960]). The Carmack Amendment thus does not change the common law rule."

It seems clear then that the principles of law remain the same even if the commodity transported is a mobile home.

Chandler alleges that normal wear and tear caused the damage to the side panels of the mobile home, as well as other damage, and that most of the damage is normal in the course of mobile home transportation. The carrier states that it is not liable for normal wear and tear and refers to a rule in Item 20 of Mobile Housing Carriers Conference, Inc., Agent, Freight Tariff No. 10-F, MF-I.C.C. No. 25, in support of its argument. The rule in that item reads in part:

> "Carrier shall not be liable for loss or damage to the trailer due to normal wear and tear and road hazards while in transit nor for loss, damage or injury to the commodity being transported, or the contents, property damage or public liability caused by any structural or other defect or mechanical breakdown, of undercarriage, wheels, tires, tubes, brakes, wheel bearings, hitches, springs, frame or any other part of the commodity being transported or of its accessories and equipment, nor for the disengaging of trailer from motive power due to no negligence of the carrier, nor caused by vehicles that do not comply with any state or federal rules, regulations or specifications. Carrier shall not be liable for the loss of

special or extra equipment not a part of the original equipment of the trailer unless specifically listed on the bill of lading or shipping receipt. Carrier shall not be liable for damage to personal effect of any kind unless evident upon delivery. Carrier shall not be liable for damage to electrical, mechanical or electronic machines, machinery or devices unless external damage is apparent."

The record shows that the mobile home was purchased new by the owner on July 15, 1972, and picked up by Chandler on January 21, 1974. The mobile home was only 18 months old when it was transported and the owner has attested to the fact that it was not moved prior to that date. The pre-inspection report indicates only that a few screws were loose at origin. Under these circumstances, it seems unusual that normal wear and tear could have caused nearly $2,000 damage to the mobile home.

In our opinion, the rule in Item 20 is ambiguous because it does not define normal wear and tear; it also appears to be a rule exempting the carrier from its own negligence and therefore in violation of 49 U.S.C. 20(11) (1970). Resolute Insurance Co. v. Morgan Drive-Away, Inc., 403 S.W. 2d 913 (Ct. App. Mo. 1966); Peter Condakes Co., Inc. v. Southern Pacific Co., 512 F.2d 1141 (7th Cir. 1975). The rule purports to free the carrier from liability for all en route damage regardless of the carrier's negligence and has added normal wear and tear and road hazards to the five noted exceptions to a common carrier's liability. The rule also excuses the carrier from liability for concealed damage to personal effects and electrical appliances by stating that external damage to that type of property must be apparent upon delivery. See Practices of Motor Common Carriers Of Household Goods, 124 M.C.C. 395 (1976), at page 415, where the Interstate Commerce Commission ordered household goods carriers to amend their bills of lading and appropriate tariffs to reflect only those defenses allowed by common law and by certain code provisions.

Chandler also refers to an estimate of repair which lists as elements of damage $500 for a new frame and $500 for labor and states that the mobile home was not involved in a collision and that damage must have been caused by an inherent weakness in the mobile home due to improper manufacture.

Chandler erroneously refers to a higher estimate of $2,443.50, prepared by Baird Mobile Houses, Inc., Salem, Indiana. However, a lower estimate of $1,942.66 was prepared by G.M. Mobile Manor, Inc., Scottsburg, Indiana, and the lower estimate was used as the measure of damage. The estimate contains a $700 cost for repair of the frame.

Chandler alleges that the mobile home was not in a collision. However, it has presented no proof of that fact nor has it presented any proof that other incidents of transportation such as excessive speed, running off the road, etc., did not cause the damage. A carrier's contributing, concurring, subsequent or superseding neglect is sufficient to make it liable notwithstanding proof of a latent defect which may relieve a carrier of liability to an owner. McCurdy v. Union Pacific R.R., 413 P.2d 617 (Wash. 1966). A carrier cannot exonerate itself by showing that all transportation services were performed without negligence but must establish that the loss or damage was caused solely by one of the excepted perils recognized at common law such as the fault of the shipper or the inherent nature of the goods themselves. Boyd v. McCleskey, 515 S.W. 2d 25 (Civ. App. Tex. 1974); Super Service Motor Freight Co. v. United States, 350 F.2d 541 (6th Cir. 1965).

In American Hoist & Derrick Co. v. Chicago M. St. P. & P. R.R., 414 F.2d 68 (6th Cir. 1969), a case analogous to this case, the railroad contracted to transport a locomotive crane operating on its own wheels on railroad tracks. The court held the railroad liable for damage and stated at page 72: "What the railroad had to establish to avoid liability * * * was that the crane was the sole cause of its own destruction." The law places a burden on Chandler to establish not the general tendency of a mobile home to be damaged in transit, but that the damage was due solely to that propensity. See Whitehall Packing Co., Inc. v. Safeway, 228 N.W. 2d 365 (Wisc. 1975). Chandler has not met this burden and merely alleges that the mobile home was not in a collision or that the damage was due to an inherent defect without providing any satisfactory proof to that effect.

We agree with Chandler that some of the items contained in the repair estimate are not a proper element of damage because (1) they do not appear to have been caused by the carrier; (2) they are the result of normal maintenance after the movement of

a mobile home; and (3) they existed prior to the transportation of the mobile home. We therefore will allow Chandler's claim in part as to the following items:

(1) Apparently not caused by the carrier:

1 formica topped pedestal table	$ 45.00

(2) Normal maintenance:

1 flex gas line	5.25
5 gallons of Kool-Seal	25.00
Kool-Seal roof labor	20.00
1 electrical receptical cover	.35
Replace gas line and check for leaks	15.00
1 quart ceiling paint	3.00

(3) The pictures of the damaged trailer indicate that the portion of the floor damaged did not contain floor covering:

1 10 foot roll of floor covering	45.00
Install floor covering	20.00
Total:	$178.60

We today are instructing our Claims Division to reopen the settlement and to allow Chandler $178.60 of its claim for $1,942.66.

R.F.KELLER

Deputy Comptroller General
of the United States