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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-189597

January 29, 1980

Richardson Transfer & Storage Co., Inc.
International Division
992 East Artesia Blvd.
Long Beach, California 90805

Attention: Brian M. Lowder

Gentlemen:

Subject: Your request for clarification of decision to McNamara-Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 415 (1978)

The McNamara-Lunz decision involved a shipment of household goods which was packed and picked up and moved into nontemporary storage in Texas. Approximately one month later the goods were picked up from storage by McNamara-Lunz without unpacking to inspect the goods. On delivery at destination in Texas loss and damage was reported. The damages were recovered from McNamara-Lunz by offset, and that carrier claimed refund, arguing that the carrier was not obligated to unpack and inspect the goods on pickup from storage. We disallowed the claim, holding that although the carrier is not obligated by its contract to unpack and inspect the goods, it is liable for any loss or damage which occurs in transit. A prima facie case of the liability of the carrier was established by showing failure to deliver the goods at destination in the same quantity and quality as received by the carrier at origin. The carrier had no evidence to rebut the legal presumption that the loss or damage occurred while the goods were in its possession.

You allege that:

"The decision is being used by both the Department of the Army and the Department of the Air Force as support for the contention that unless sealed cartons, received from a storage warehouse, are opened, inspected and repacked the items are presumed to

> have been received by the carrier in the original condition. The carrier is then held liable for any damages noted upon delivery unless it can be proved by affirmative evidence that loss or damage did not occur while in the carriers custody."

You also state that the Military Traffic Management Command (MTMC) has by message ". . . specifically stated that any shipment moving from a storage warehouse, which was packed prior to storage, will not be repacked by the carrier at Government expense unless the repacking is authorized by the origin/responsible Transportation Officer." You then assume that if the containers are to be inspected and repacked it must be done at carrier expense but, you say, repacking is a billable charge under your tariff and you believe that you are prohibited by section 217 of the Interstate Commerce Act, 49 U.S.C. 317, from performing billable services free of charge.

You further state that both the Army and the Air Force are refusing "to accept the good external condition of the container upon delivery as evidence that damage or loss was due to improper packing," and that it is "patently unfair and in violation of the spirit of the law that carriers are being forced through offset action to pay this type of claim."

You request that we clarify the decision as it relates to "carrier liability for loss and damage to sealed containers, received by the carrier from storage, when the carrier is not allowed or authorized to open, inspect and repack the sealed containers."

The Department of the Air Force was granted the opportunity to comment on your request. (The Department of the Army declined comment).

The Air Force states that there is no basis in fact for your assertion that carriers are not allowed to open, inspect and repack shipments coming out of storage. It refers to Item 25B of Military Rate Tender 20-W (Tender 20-W), filed on behalf of Richardson Transfer and Storage Co., et al., by the Movers' and Warehousemen's Association of America, and quotes this part of the item:

> "Any complete shipment moved from a storage warehouse for which preliminary packing was

performed prior to storage will not be repacked unless directed by the installation transportation officer to insure safe transportation to destination."

The Air Force states that under this provision transportation officers could authorize a carrier to repack some or all of a shipment coming from nontemporary storage provided that the carrier could produce evidence that repacking was necessary to insure safe delivery. The Air Force also states that once you satisfy the transportation officer issuing the Government bill of lading (GBL) that repacking is necessary, you can be paid for that additional service.

You are mistaken in your belief that you are prohibited by the Interstate Commerce Act from performing services for the United States without charge. Section 22(1) of the Interstate Commerce Act, as amended, 49 U.S.C. 22 (1976), made applicable to motor carriers by section 217(b) of the Act, 49 U.S.C. 317(b), provides in part that "Nothing in [Part I of the Act] shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States . . . ." Thus, and although it has nothing to do with your liability as a common carrier for loss and damage to property entrusted to you for transportation, you could repack a Government shipment at no cost to the Government.

Reliance on Item 25B of Tender 20-W, which is said by the Air Force to contain language similar to that in the MTMC message, likewise has nothing to do with your liability as a common carrier for loss or damage to property while in your possession for transportation.

Item 25B of Tender 20-W reads:

"ITEM 25B SHIPMENTS FROM STORAGE (See Note)

Any complete shipment moved from a storage warehouse, and for which preliminary packing was performed prior to storage, will not be repacked unless directed by the installation transportation officer to insure safe transportation to destination. When packaging is not required, the applicable single factor rate named will be reduced by $2.25 per net cwt.

NOTE: Item has no application if only a portion of the shipment in storage is removed from storage."

Tender 20-W does not apply to shipments transported intrastate. Assuming, however, that the similarly worded MTMC message does apply to shipments transported intrastate, it merely reflects the facts that normally shipments of household goods are packed and crated by the line-haul carrier (or its agent) and that the single factor transportation rate offered to the Government for the transportation of the household goods includes a charge for that packing and crating. See Trans Ocean Van Service v. United States, 426 F.2d 329, 344 (Ct. Cl. 1970).

Furthermore, it is questionable whether Item 25 (and, presumably, the similarly worded MTMC message) applies if only part of a shipment is removed from storage or if only part of a shipment needs to be repacked.

We turn now to your request that we clarify the decision as it relates to carrier liability for loss and damage to sealed containers, received by the carrier from storage, when, you say, the carrier is not allowed or authorized to open, inspect and repack the sealed containers.

As indicated in the decision, a shipper makes out a prima facie case of carrier liability for loss or damage in transit by showing a failure to deliver at destination the same quantity or quality of goods received by the carrier at origin. See Missouri Pacific RR v. Elmore & Stahl, 377 U.S. 134 (1964). We find no legal authority for the proposition that different rules apply for establishing a prima facie case of carrier liability for loss or damage simply because the commodity transported is household goods. And when at destination the contents of a sealed and not visibly damaged carton are missing or damaged, evidence must be produced by the shipper to establish that the contents were undamaged and not missing when delivered to the carrier at origin. Spartus Corp. v. S/S YAFO, 590 F.2d 1310, 1319 (5th Cir. 1979); Ed Miniat, Inc. v. Baltimore & Ohio RR, 587 F.2d 1277 (D.C. Cir. 1978); Hoover Motor Express Co. v. United States, 262 F.2d 832 (6th Cir. 1959); World Wide Meats, Inc. v. Chicago & North Western Transportation Co., 363 F. Supp. 807 (N.D. Iowa 1974); Kluvar v. Midwestern Transportation, Inc., 534 P.2d 662, 665 (Sup. Ct. Okla. 1975).

You contend that a carrier is not allowed or authorized to open, inspect and repack sealed containers. As for inspection, the general rule seems to be that a common carrier cannot insist ordinarily upon obtaining knowledge of the character of goods offered for transportation except where offered in circumstances indicating contents of a suspicious or dangerous nature. United States v. Pryba, 502 F.2d 391, 399 (D.C. Cir. 1974); Bruskus v. Railway Express Agency, 172 F.2d 915, 918 (10th Cir. 1949); The Nitro-Glycerine Case 15 Wall. 524, 535 (1872). But a carrier can require the shipper to make representations regarding the nature of the property tendered for transportation, Household Goods Carriers' Bureau v. Interstate Commerce Commission, 584 F.2d 437, 456 (D.C. Cir. 1978, Wilkey, Circuit Judge, dissenting). In any event, inspections are not customarily done. See Texas & Pacific Ry. v. George, 466 S.W.2d 659, 661 (Ct. Civ. app. Texas 1971).

As for repacking, to protect itself, a common carrier has no obligation to receive and transport property not prepared for shipment in the manner ordinarily required by it and it can refuse to accept property which it believes has been improperly packed. See Textile Distributors, Inc. v. Roadway Express, Inc., 397 S.W.2d 760, 763 (Ct. App. Mo. 1965); Household Goods Carriers' Bureau v. I.C.C., supra, p. 440. If repacking is required it should be done at Government expense. See 41 C.F.R. § 101-41.302-6; cf. Item 5 of Tender 20-W.

Refusal of the military services to accept the good external condition of the container upon delivery as evidence that the damage or loss was due to improper packing is proper. As was stated in the decision, 57 Comp. Gen. at pages 418 and 419, once a prima facie case of carrier liability for loss or damage in transit has been established by a showing of a failure to deliver the goods in the same quantity or quality at destination as received by the carrier at origin, the burden is on the carrier to prove that faulty packaging was the sole cause of the loss or damage, and a mere allegation or supposition does not satisfy this burden. See 55 Comp. Gen. 611, 613 (1976).

Nor do we believe that it is patently unfair or in violation of the spirit of the law that carriers are forced through offset action to pay this type of claim. In United States v. Munsey Trust Co., 332 U.S. 234, 239, 240 (1947), the Supreme Court stated that "the government has the same right 'which belongs to every creditor, to apply the unappropriated monies of his debtor, in his hands, in

extinguishment of the debts due to him . . . .'" See also Garrett Freightlines, Inc. v. United States, 10th Cir., Docket No. 76-2078, decided June 21, 1978.

Sincerely yours,

L. Mitchell Dick

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