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DECISION

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

q 396

FILE: B-193101 DATE: March 12, 1979

MATTER OF: IML Freight, Inc. CNG-00045

DIGEST: [Claim Reconsideration for Amount Owed by Government For Damages During Shipment]

1. Prima facie case of carrier liability is established when evidence shows that (1) shipment was delivered to carrier at origin in good condition, (2) shipment arrived at destination in damaged condition and (3) amount of damages can be established.

2. If shipper improperly loads shipment and improper loading is apparent to ordinary observation, carrier is liable notwithstanding shipper negligence.

3. In order to fulfill duty to safely transport goods delivered to it in good condition, carrier should inspect goods loaded by shipper.

4. When questions of fact are disputed between claimant and administrative agency, GAO will accept as correct facts furnished by agency in absence of preponderance of evidence to contrary.

5. Carrier, advised by shipper of damage to shipment at delivery, must inspect shipment in order to preserve any defenses it may have.

6. Deduction by shipper for balance of damages after deducting salvage value does not entitle carrier to possession of damaged article as if carrier had purchased salvage value because shipper deducted difference between original value of shipment and proceeds from its salvage and therefore carrier was not charged for salvage value.

This decision is in response to a letter of August 15, 1978, from IML Freight, Inc. (IML) requesting reconsideration of the action taken by our Claims Division in its settlement certificate issued on July 21, 1978, claim number Z-2621106(1). IML's claim number is 15-472827. In the settlement, the Division disallowed IML's claim for $2,844 which was administratively set off from amounts owed to IML by the Government. The deduction represents the value of damages to a shipment of aircraft fuel tanks transported in 1974 by IML from Travis Air Force Base, California, to Hill Air Force Base, Utah, under Government bill of lading (GBL) No. K-5815917.

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The record indicates that on September 19, 1974, a less-than-truckload shipment of eight crates containing a total of 32 aircraft fuel tanks were tendered to IML on GBL No. K-5815917. The loading, blocking and bracing of the crates were performed by Government personnel in the presence of and within the observation of IML's truckdriver. At this time no objections were raised with respect to the condition of the crates. Subsequently, during a trailer transfer, apparently at the carrier's terminal in Sacramento, California, an agent of IML noticed damage to some of the crates and wrote "crates in very poor condition from exposure 3 crates damaged" on the shipping order copy of the GBL.

When the crates were delivered to Hill AFB, a Government inspector noted on his report that one of the crates was broken and that the tanks inside were exposed with pipes or tubes appearing to be bent. At that time, photographs of the crate were taken. Notice and an opportunity to inspect the damage were given to IML upon delivery but IML waived inspection. It was later determined that the four tanks in the crate were damaged beyond economical repair and that they were worth $774 each with a salvage value of $53 per tank. A claim for $2,884 was presented to IML. The claim was denied and after an exchange of correspondence the $2,884 was collected by deduction.

IML contended that it waived inspection of the damaged crate upon arrival at Hill AFB because the Government inspector who originally inspected the crates allegedly indicated to IML over the telephone that the damage was limited to crate damage only and that the contents of the crate were intact. The telephone conversation between the inspector and IML cannot be verified because the inspector is now retired from Government service and the record is void of any proof of the substance of the conversation. In any event, IML has never inspected the damaged tanks and it now seeks to gain possession of them on the theory that the deduction made by the Government for their damage entitles IML to the tanks as if IML had purchased them from the Government.

The central issue in this case is whether the Government has established a prima facie case of carrier liability. A prima facie case is established when the evidence shows that (1) the shipment was delivered or turned over to the carrier at origin in good condition or at least in better condition than when received at destination, (2) the shipment arrived in a damaged condition and (3) the amount of damages can be established. If a prima facie case is established then IML is liable without proof of negligence unless it affirmatively shows that the damage was caused by the shipper, an act of God, the public enemy, the public authority or the inherent

vice or nature of the commodity. Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134, 138 (1964). Thus, in the present case, if the Government proves the elements of a prima facie case, then IML must affirmatively prove that it was not liable for the damages.

In this instance, all of the elements of a prima facie case have been established. The original GBL establishes that the crates were in good condition when they were turned over to IML and the carrier's delivery receipt shows that one crate was damaged when delivered at destination. Other evidence in the record establishes the value of the damages.

IML argues that Government personnel improperly loaded the crates at Travis AFB and that IML took an exception to the condition of the crates in Sacramento at the trailer transfer.

The general rule is that when the shipper performs the loading, he is responsible for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier. However, if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. United States v. Savage Truck Line, Inc., 209 F.2d 442, 445 (4th Cir. 1953), cert. denied, 347 U.S. 952 (1954); 52 Comp. Gen. 930 (1973). In this case, a statement issued by the warehouse foreman at Travis AFB states that IML's driver was present during the entire loading process and that "the material being loaded and the method of loading with forklifts was open to ordinary observation at all times." Thus, any improper loading would have been or should have been observed by IML's driver and noted on the GBL at Travis AFB. This way, any defense IML would have had with respect to the loading would have been preserved. Also, if the crates were loaded properly but were in anything other than good condition at the time of the loading, IML's driver would have or should have likewise noted this on the GBL. Because IML's driver did not make such an objection, we assume that there was no reason at that time to object to the condition of the crates.

The theory behind both of these reasons is that the carrier had the opportunity to object to the condition of the crates or to their loading and did not do so. Although a carrier is not required to inspect goods prior to their shipment, the court in Carrier Corporation v. Furness, Withy & Co., 131 F. Supp. 19, 21 (E.D. Pa. 1955) emphasized that because a carrier does have the duty to safely transport goods delivered to it in good condition, an inspection by the carrier should take place to prevent any damage en route.

The statement made by the warehouse foreman who supervised the loading of the crates indicates that there was no visible damage to the crates or their contents at the time of the loading and no objections were raised by IML concerning the condition of the crates at that time. Although IML did note on the shipping order copy of the GBL that the crates were in poor condition when the shipment was transferred in Sacramento, the original GBL, issued by the carrier at Travis Air Force Base shows that no objection was made when the shipment was tendered to the carrier. The damage could have occurred between the time the crates were picked up by IML at Travis AFB and the time the shipment was transferred in Sacramento. If the damage was great enough for IML to notice in Sacramento then there is no reason why it would not have been noticed at Travis AFB if the crates were in the same poor condition.

Furthermore, when questions of fact are disputed between a claimant and administrative agencies of the Government, it is the long-established rule of this Office to accept the statements of fact furnished by the agencies in the absence of a preponderance of evidence to the contrary. 41 Comp. Gen. 47, 54 (1961), 46 id. 740, 744 (1967), 51 id. 541, 543 (1972). Thus, because IML has provided no evidence to the contrary we have accepted the statement made by Travis AFB personnel that the crates had no visible damage when they were tendered to IML. We have also accepted as a fact the inspection report issued by Hill AFB showing damage at destination and its estimate of the amount of damage done to the tanks.

IML did not take advantage of its initial opportunity to inspect the crate due to the Hill AFB's inspector's alleged assurances that no damage existed to the content of the crate. It is unfortunate that the conversation may have been misunderstood by IML and that it, therefore, did not knowingly waive inspection of the damaged contents. It is also unfortunate that IML was not given a second opportunity to inspect the contents even though it repeatedly requested to see proof of the damage. However, we believe that it should have been clear to IML that the shipment was damaged at delivery since this was the purpose of the telephone call. A shipper does not ordinarily notify a carrier of damage to a shipment unless it is probable that there is content damage. When this is coupled with the fact that IML's agent noted on the shipping order copy of the GBL in Sacramento that the shipment was in poor condition, it is clear that IML should have inspected the shipment immediately in order to preserve its rights. Indeed, regardless of whether inspection was knowingly waived, it appears that this was a matter of managerial discretion which was wrongly exercised in this particular case.

IML now contends that the deduction made to compensate the Government for damage to the tanks entitles IML to the possession of the

tanks. This contention clearly is erroneous. Generally, a shipper has two choices when its goods are damaged by the carrier. It can either dispose of the goods and make a claim against the carrier for the difference between the original value of the shipment and the proceeds from its salvage or it can release the goods to the carrier and make a claim against the carrier for the full value of the goods. In re Penn Central Transportation Co., 351 F. Supp. 1348 (E.D. Pa. 1972).

In the present situation, the Government, as the shipper, chose to follow the first choice. After making a claim against IML for the value of the tanks less salvage value, it deducted that amount from the amount owed by the Government to IML. Each tank was worth $774 with a salvage value of $53. Thus, the Government properly deducted $2,844 ($774-$53=$721x4=$2,844). Because salvage value was taken into account, IML has no right to the possession of the damaged tanks.

The action of our Claims Division in disallowing IML's claim was correct and is sustained.

R.F.K.11a

Deputy Comptroller General
of the United States