DECISION

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

27154

FILE:B-193432; B-211194 DATE: January 5, 1984

MATTER OF: Chandler Trailer Convoy, Inc.

DIGEST:

1. Carrier's contentions that the government cannot establish prima facie cases of carrier liability for damages to mobile homes because (1) the mobile homes were old and used, and (2) the defective condition of the mobile homes at origin was concealed are without merit. The fact that the mobile homes were old and used is not necessarily inconsistent with a finding that they were in good condition at origin, and those components of the mobile homes that were damaged were all visible upon routine inspection.

2. The fact that a tire blows is insufficient per se to establish an inherent vice and, where a carrier presents no other evidence that damages to mobile homes were the result of an inherent vice of the mobile homes' tires or wheels, the carrier cannot avail itself of the inherent vice exception to common carrier liability.

3. A common carrier cannot disclaim liability for damages to goods in transit through provisions in its tariffs and commercial bills of lading that purport to expand upon the limited exceptions to common carrier liability since these provisions appear to violate the statute governing a common carrier's liability, 49 U.S.C. § 20(11) (1976).

4. Carrier's contention that it is not liable for damages to utility pipes allegedly tied up underneath a mobile home is without merit since a carrier is responsible for improper loading that can be discovered by ordinary observation.

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5. A delivery receipt is not conclusive evidence of the condition of goods at destination; thus, a prima facie case of carrier liability for damages to a mobile home is not limited to those minor damages noted on the delivery receipt where the initial inspection of the mobile home at destination was by flashlight after dark, the bulk of the damage was discovered the next morning and promptly reported to the carrier, further damage was discovered only after a heavy rainfall, and the carrier was not prejudiced by the piecemeal discovery of the damages.

6. Contention that agencies lack authority to satisfy claims by administrative offset because such claims are not liquidated or certain in amount is without merit. The government has the same common-law right as any creditor to apply money in its hands belonging to its debtor against the debt and may set off the estimated amount of its claims even in the absence of final resolution of the underlying dispute.

7. Claim for funds allegedly improperly deducted by administrative setoff from monies otherwise due the claimant is denied where it appears from the record that no such set off occurred and the underlying dispute is a matter between private parties.

Chandler Trailer Convoy, Inc. filed four claims with our Claims Group requesting review of two setoff actions by the Air Force and two by the Marine Corps. Chandler's claims arose in connection with damages to mobile homes it transported for members of the military under government bills of lading. In each case, the members filed claims with the services under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. §§ 240-243 (1976)(now codified at 31 U.S.C. § 3721). The services paid the members' claims, either in whole or in part, and thus becoming subrogated to the members' rights against Chandler, began to set off the amounts paid against monies otherwise due the carrier. Chandler

contends that it is not liable for all or part of the damages and that, in any event, the services have no setoff authority because their claims are not liquidated or certain in amount. We agree with the Air Force that a portion of one of Chandler's claims may be refunded and deny the remaining claims.

Chandler presents a number of arguments common to each of its four claims. We discuss these arguments first, then dispose of the individual claims, and lastly, respond to Chandler's position regarding setoff authority.

General Contentions

Chandler agrees that, as a common carrier, its liability for damages to the members' mobile homes is controlled by the Carmack Amendment of 1906, section 20(11)of the Interstate Commerce Act, 49 U.S.C. § 20(11) (1976), which makes carriers subject to its provisions liable for the full, actual loss or damage caused by them to property they transport and declares unlawful and void any attempted means of limiting this liability. The statute codifies the common-law rule that a carrier, although not an absolute insurer, is liable without proof of negligence for all damage to goods it transports unless it can show that the damage was caused by (1) an act of God, (2) the public enemy, (3) the fault of the shipper, (4) public authority, or (5) the inherent vice or nature of the goods. In an action to recover for damages to a shipment, the shipper establishes a prima facie case of carrier liability when it shows delivery to the carrier in good condition, arrival at destination in damaged condition, and the amount of damages. The burden is then upon the carrier to show both that it was free from negligence and that the damage was due to one of the excepted causes relieving it of liability. See Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134 (1964).

In each of these four cases, the record contains a premove inspection sheet signed by the carrier's driver indicating that, except for noted defects, each mobile home was in good condition. At destination, each mobile home showed evidence of damage more extensive than that noted at origin.

There are written estimates or other independent determinations as to the amounts of damages. Thus, under Missouri Pacific R.R., there exist prima facie cases of carrier liability for the damages claimed.

Chandler acknowledges that Missouri Pacific R.R. controls here but argues that the government has not established prima facie cases because the mobile homes were old and used. We see no merit to this argument. The question is whether the shipments were actually in good condition at origin, or at least in better condition than at destination. See Paul Arpin Van Lines, Inc., B-193182, March 18, 1981. The fact that the mobile homes were old and used is not necessarily inconsistent with a finding that they were in good order. Moreover, in Chandler Trailer Convoy, Inc.--Reconsideration, B-193432, September 13, 1979, 79-2 CPD 193, we held that the facts that a mobile home had been in use for several years, that it had been moved previously, and that the exterior showed signs of wear did not constitute the convincing proof required to rebut the presumption of good order delivery to the carrier established by the bill of lading.

Chandler also contends the government has not presented prima facie cases because although the pre-move inspection records indicated that the mobile homes were apparently in good condition at origin, the actual, defective condition of the mobile homes was concealed. Chandler maintains that the shipment of a mobile home is similar to a situation in which a shipper loads, crates, boxes, packs, or otherwise prepares a shipment for transport. In such cases, says Chandler, the carrier is not liable for damages due to improper loading that it cannot discover by routine inspection. We do not agree with Chandler that these cases involve concealed, pre-existing damage. Unlike the contents of packages or the internal parts of some household goods, see, e.g., Paul Arpin Van Lines, Inc. supra (involving damage to a sofa frame covered by upholstery), which are not visible, the components of these mobile homes that the members claim were damaged were all visible upon routine inspection.

Chandler also argues that even if there are prima facie cases of its liability for damages in some of these claims,

the carrier escapes liability because the damages were due to one of the common law exceptions, inherent vice. Chandler contends in at least two of these cases that the damage was caused by numerous flats, blowouts, or other wheel failures occurring during the move and that this indicates that the wheels or tires were defective. We rejected this argument, however, in National Trailer Convoy, Inc., B-199156, March 5, 1981, 81-1 CPD 168. In that case, relying on Springer Corp. v. Dallas & Mavis Forwarding Co., 559 P.2d 846 (N.M. Ct. App. 1976), cert. denied 561 P.2d 1347 (1977), we said that a tire blowout does not establish an inherent vice or defect. Chandler contends that we misconstrued Springer. We do not agree. In Springer, the court held that the mere fact that a tire blew was insufficient per se to establish an inherent vice. We so stated in National and see no reason to depart from that view here. Chandler has presented no other evidence that an inherent vice of the tires or wheels caused any of the damage, and therefore cannot avail itself of this exception to common carrier liability.

Chandler also contends that it is not liable here under the terms of its tariffs and commercial bills of lading, which in effect shifts the burden of proving how damage occurred back upon the shipper. Its tariffs provide, in essence, that Chandler shall not be liable for loss or damage to the commodity transported due to normal wear and tear and road hazards while in transit, or caused by any structural breakdown or other defect or the mechanical breakdown of the undercarriage, wheels, tires, brakes, wheel bearings, hitches, springs, frame, or any other part of the commodity being transported, or its accessories or equipment. Chandler contends that the damages in these cases were the result of normal wear and tear, structural or other defect, or the mechanical breakdown of the units.

In 55 Comp. Gen. 1209 (1976), we stated that a similar disclaimer appeared to violate the Carmack Amendment because it purported to excuse the carrier from liability for damages in transit regardless of the carrier's negligence and it otherwise expanded upon the Amendment's limited exceptions to common carrier liability. Chandler argues that there is no longer any legal basis for ignoring these provisions, however, because the Interstate Commerce Commission

discontinued a rulemaking proceeding that Chandler suggests would have invalidated this tariff provision. Transportation of Mobile Homes, Ex parte No. MC-108, I.C.C., November 15, 1979. Although Chandler interprets the Commission's action as tacit approval of its disclaimer, we believe this interpretation is incorrect. In its order discontinuing the proceeding, the Commission expressed no opinion concerning the validity of Chandler's or similar disclaimers; it said only that "the prescription of the proposed regulations is not justified." Id. Moreover, the Supreme Court stated in Missouri Pacific R.R., at note 15, that the legal effect of the Carmack Amendment was to bar the Commission from legalizing tariffs limiting the common-law liability of carriers. Thus, we do not believe that Chandler can limit its liability under the Carmack Amendment by disclaimers in its tariffs or bills of lading.

Finally, Chandler argues there is no credible evidence in the records of the four claims that it contributed by its negligence to the damages to the mobile homes. As indicated above, however, a finding of carrier liability is not dependent on finding the carrier negligent. The negligence or due care of the carrier becomes significant only if the carrier also establishes that the damages resulted solely from one of the excepted causes. Nevertheless, as can seen from the discussion below of the individual cases, there is ample evidence in some of these cases to support a finding that the damages were caused, at least in part, from the negligent actions of Chandler's drivers.

Specific Cases

Z-2608885(15)

Chandler appeals a setoff by the Air Force of $466.08 in connection with a claim for damages to a mobile home owned by Sergeant Lane A. Kirth. The damage allegedly occurred in the course of Chandler's transport of the mobile home from Vanderberg Air Force Base to Davis, California under Government Bill of Lading (GBL) No. S-1,654,625. The Air Force paid Sergeant Kirth's claim of $466.08 in full and

attempted to collect this amount from Chandler. Chandler denied liability and, unable to reach a settlement, the Air Force proceeded to setoff the $466.08 from monies otherwise due the carrier. We agree with the agency that $41.15 may be refunded to Chandler and conclude that the remainder of the setoff action was proper.

The pre-move inspection record, signed by both Sergeant Kirth and a representative of the carrier, required a description of any apparent damage existing at origin and an indication of the location of this damage on pre-printed diagrams. With the exception of a notation concerning the right side of the mobile home, the form did not indicate any pre-existing damage. The carrier does not contend that any of the damage involved in Sergeant Kirth's claim existed at origin. Upon delivery, Sergeant Kirth noted damage to 10 feet of sewer pipe, two sewer joints, the water intake, the gas-line elbow, the front window ledge, the left side next to the water heater, the flex line to the water heater, the hitch, the outside electrical outlet, and the outside electrical hook-up box. The record contains an estimate from Quality Mobile Home Services in the amount of $466.08 covering the cost of parts and labor for repair of most of these items.

Chandler contends that the government has not established prima facie case of liability because Sergeant Kirth's mobile home was old and used. As indicated earlier, however, this allegation, even if true, is not sufficient to rebut the presumption of good order established by the pre-move inspection record. See Chandler Trailer Convoy, Inc.--Reconsideration, supra.

Chandler contends that Sergeant Kirth's mobile home was damaged when its wheels came off during the move and rolled back underneath the unit. In Chandler's opinion, the "wheel breakage" indicates both that the unit was defective and that the shipper was at fault, since Sergeant Kirth allegedly put the tires on at origin improperly. Chandler also contends that damage to the pipes was due to the fault of the shipper

because the pipes were improperly tied up underneath the unit.

Chandler presents no evidence in support of its allegation that the wheels or tires were defective; there is thus no basis for us to so conclude. Chandler's contention that the shipper improperly installed the wheels and some of the utility pipes is inconsistent with the pre-move inspection record which indicates that the tires were in "good" condition and that the lug nuts were tightened before pick-up. The driver took no exception with respect to the utility pipes and, in any event, a carrier is responsible for improper loading that can be discovered by ordinary observation. IML Freight, Inc., B-193101, March 12, 1979. When a carrier knows that goods are in danger of loss, it must use care to avoid this consequence. Chandler Trailer Convoy, Inc., 56 Comp. Gen. 358 (1977).

We conclude that the Air Force has established a prima facie case of carrier liability and that Chandler has failed to prove that it is not liable. Our conclusion in this matter is buttressed by evidence in the record (which Chandler characterizes as hearsay, but which is nevertheless entitled to some weight) indicating that the damage occurred as a result of negligence of Chandler's driver. A claims agent for Sergeant Kirth's insurance company interviewed the manager of the mobile home park to which Chandler delivered the Sergeant's unit. The manager reportedly said that it was late in the evening when Chandler's driver arrived, and in the process of bringing the unit into the park, the driver got two wheels astride a drainage gully. When he tried to turn, the axle and tongue of the mobile home sprung. The driver then caused the right rear corner of the mobile home to collide with a light post, damaging three vertical panels. He also turned the truck cab too sharply, running the edge of the cab into the mobile home and causing further damage.

Finally, the agency states that $41.15 of the $466.08 setoff against Chandler represents damage to the trailer's electrical box which may not have been caused by Chandler. The agency says it would consider a refund to Chandler of the $41.15 "to be fair and reasonable under the circumstances."

We have no reason to question the agency's judgment on this matter and we agree that the $41.15 should be refunded to Chandler.

Z-2608885(16)

Chandler claims $1,082 which it says the Air Force set-off for damage to a mobile home owned by Staff Sergeant James L. Harrison and transported by Chandler from Alamogordo, New Mexico, to Greenfield, Tennessee, under GBL No. AP-300,655. The Air Force reports that it has suspended its collection efforts and initiated setoff action but that setoff has not yet occurred; it will take no further action on the setoff pending our decision. Although Chandler's claim thus is premature, we provide our views on this matter since the Air Force has determined that setoff is warranted and we see no point in merely delaying our consideration of Chandler's grievance until after an actual setoff.

The pre-move inspection record indicated that, at origin, there were small dents on some of the mobile home's exterior panels and some of the panels were stained by roofing tar, paint, and cooling fluid. The interior of the unit showed only "normal wear and tear." Chandler says there was "considerable exterior damage" but does not contend that any of the damage that Sergeant Harrison alleges occurred during the move existed at origin.

The owner followed the mobile home in his car and submitted a detailed description of the move. He reported that their route took them through several stretches of construction and that the mobile home had 11 blowouts and 4 flat tires. The flats were fixed, and the owner purchased 11 replacement tires from Chandler's driver. At destination, Sergeant Harrison noted exceptions to the condition of the mobile home and secured an estimate of the amount of damages. The record contains an engineer's inspection report stating that all indications were that the damage was caused by an imbalance on the right side of the trailer resulting from numerous tire failures on that side. The imbalance caused the trailer to sway or fishtail, which in turn caused the exterior panels to buckle and the windows to warp.

Chandler argues that it is not liable because the damage was the result of defective tires. There is no proof in the record, however, that any of the tires were defective, and as indicated earlier the mere fact that a tire fails does not alone indicate a defect. See National Trailer Convoy, Inc., supra. Chandler also argues that because all of the tires belonged to Sergeant Harrison, including both those on the trailer at origin and those purchased from Chandler's driver, the damage to the mobile home was the fault of the shipper. As the agency notes, however, this contention is nothing more than the defective tire argument in different clothing, an argument that Chandler has failed to prove. Thus, none of the exceptions to common carrier liability applies.

Chandler also contends that it is not liable under the terms of its tariff and because there is no proof in the record that it was negligent. As indicated earlier, we believe the carrier's tariff violates the Carmack Amendent and is void. 55 Comp. Gen. 1209, supra. Since the carrier has not shown that the damage in this case was the result of an excepted cause, we need not consider whether the carrier was negligent.

Z-2608885(17)

Chandler claims $1,751.50, a portion of an amount the Marine Corps set off for damage to a mobile home owned by Staff Sergeant Richard A. Linger and transported by Chandler from Brownwood to Whitesborough, Texas, under GBL No. M-3,643,298. We deny the claim.

The record contains a statement from Sergeant Linger's wife and attorney. Mrs. Linger states that the carrier's tractor collided with the mobile home during the move, and upon delivery, the mobile home was dragged on the ground and then fell off a jack. Mrs. Linger reports that the driver inspected the mobile home by flashlight because it was dark. He noted on the delivery receipt three small scratches on the trim and that a screw had been pulled through the lower front. Early the next morning, however, Sergeant and Mrs. Linger noticed daylight coming through a wall, the separation of walls from the floor, and other damage. Mrs. Linger

states that she called Chandler immediately, but there was no answer because it was Saturday. She called again on Monday and informed the carrier's dispatcher of the additional damage. The dispatcher reportedly advised her to contact Carswell Air Force Base for advice on submitting a claim. The owners obtained an estimate to repair this damage from Sentry Housing, Inc. The estimate was dated 9 days after delivery of the mobile home. Several weeks later, as a result of a heavy rainfall, the owners discovered that all of the windows in the mobile home leaked. They then obtained a second repair estimate from Sentry for this damage.

Chandler acknowledges that the pre-move inspection report contained no exceptions and admits that it delivered the mobile home in damaged condition. Chandler contends, however, that there exists a prima facie case of carrier liability only as to those damages noted on the delivery receipt and that the government must prove that any other damage resulted from carrier negligence. Chandler admits to being liable for only $67 and claims the difference between that amount and the $1,818.50 set off by the Marine Corps.

We do not agree with Chandler that the government's prima facie case of liability extends only to those damages indicated on the delivery receipt. In Trans Country Van Lines, Inc., 57 Comp. Gen. 170 (1977), we recognized that a clear delivery receipt is not conclusive evidence of the condition of goods at destination and does not preclude proof that the goods were in fact damaged when received from the carrier. This principle is illustrated in National Trailer Convoy, Inc., supra. In that case, the delivery receipt was clear, but some damage was discovered 3 days after delivery, more was noted in an inspection 13 days after delivery, and the remaining damage was revealed 2 months later. The house trailer had not been moved during this period. We held that these facts established a prima facie case of carrier liability and undercut the carrier's contention that the damage occurred after delivery.

In this case, the record indicates that some damage was discovered upon delivery, but not all of the damage could be

seen because it was dark. The owners discovered additional damage the following day and promptly reported it to the carrier the next working day. They discovered that the windows leaked only when it rained heavily. There is no indication of appreciable delay in obtaining repair estimates. Most significant, there is no indication in the record, nor does Chandler argue, that it was prejudiced in any way by the piecemeal discovery of the damages. In fact, although it is clear that Chandler knew that some damage existed upon delivery, it contented itself with the flashlight inspection made by its driver rather than conducting a more thorough examination when conditions permitted. In effect, Chandler closed its eyes to the actual condition of the mobile home upon delivery. Since Chandler has given us no reason to question the repair estimates obtained by the owners, we deny Chandler's claim.

Z-2608885(18)

Chandler claims $2,800 which it says the Marine Corps set off from monies otherwise due the carrier to satisfy a claim by Staff Sergeant Rodney S. Patterson. Since it appears from the record that no such setoff occurred, and that the dispute is actually a private matter between Chandler and Sergeant Patterson, we deny the claim.

The record indicates that the carrier picked up Sergeant Patterson's mobile home in Jacksonville, North Carolina, for transportation to Brunswick, Maine, under GBL No. K-0,997,949. At some point near Harrisburg, Pennsylvania, the main framework under the trailer was bending and buckling over the axle. Chandler contacted Sergeant Patterson who authorized the installation of a third axle and reinforcement of the framework. Sergeant Patterson paid the bill of $2,814 for these repairs. Chandler's driver resumed the move, but terminated it shortly thereafter because the unit had deteriorated to the point where it could no longer be transported. The driver abandoned the unit at a truck stop in Pittston, Pennsylvania. The Marine Corps then issued a corrected GBL terminating the shipment because of "trailer disintegrating." Sergeant Patterson transferred title to the trailer to the owners of the truck stop in satisfaction of their claim for storage.

Sergeant Patterson filed a claim with the Marine Corps for the value of the mobile home and for the $2,814 repair. The Marine Corps paid $8,685 on the claim, the average of two "blue book" values, and collected this amount from Chandler by setoff. With respect to the repairs, the Marine Corps acknowledges that Chandler was authorized under its tariff to collect from Sergeant Patterson the reasonable costs of repairs en route, but notes that such repairs are usually limited to tire replacement and occasional welding. The Corps maintains that Chandler is responsible for damage to Sergeant Patterson's mobile home both before and after the repair in Harrisburg. The Corps denied the claim for the repair, however, in order "to be evenhanded and give the benefit of the doubt to Chandler." By statute, settlement by the Corps is final and conclusive with respect to the Seageant's claim against the United States. 31 U.S.C. § 242 (1976) (now codified at 31 U.S.C. § 3721(k)). Sergeant Patterson continues to pursue the matter of the repair bill directly with Chandler.

In the course of attempting to collect from Chandler the $8,685 it paid on Sergeant Patterson's claim, the Marine Corps sent Chandler a form letter, dated June 21, 1982, indicating that it would initiate setoff action unless it received payment from Chandler within 30 days. Chandler apparently understood this letter as applying to Patterson's claim against it for the $2,814 repair bill. Some months later, Chandler wrote to this Office alleging an improper setoff in the amount of $2,800 and denying liability for the repair. The record contains no indication, however, that any amount has been set off in connection with the repair bill, and the Marine Corps states that Chandler's understanding to the contrary is in error. Whether Chandler is ultimately liable for the repair is now a private matter between it and Sergeant Patterson. Since Chandler does not question the propriety of the $8,685 setoff for the value of the mobile home, we deny the claim.

Setoff Authority

Chandler contends that the agencies in these cases lack authority to satisfy their claims against the carrier by administrative offset. Chandler's position is that since it

contests its liability for damages to the mobile homes, the setoff provision of the Federal Claims Collection Standards (FCCS), 4 C.F.R. § 102.3 (1983), does not apply because the claims against Chandler are not liquidated or certain in amount. We conclude that administrative offset is authorized in these cases.

The FCCS, 4 C.F.R. Parts 101-105, are regulations issued jointly by the Comptroller General and the Department of Justice implementing the Federal Claims Collection Act of 1966, now codified at 31 U.S.C. § 3711. That Act, the first legislative attempt to establish a government-wide debt collection program, did not mention administrative offset. This apparently was in recognition that the government has the same common-law right as any creditor to apply against the debt money in its hands belonging to the debtor. See United States v. Munsey Trust Co., 322 U.S. 234 (1947); Social Security Administration-Debt Collection, B-210086, July 28, 1983, 62 Comp. Gen. ____. The FCCS directs agencies to collect by offset "claims which are liquidated or certain in amount in every instance in which this is feasible." 4 C.F.R. § 102.3.

The phrase "liquidated or certain in amount" is not defined by the FCCS, and it is not clear from the language of the regulations exactly what limitations it places on an agency's use of setoff. We have held, however, that the government may set off the estimated amounts of its claims, Metro Machine Corporation, B-187178, October 7, 1976, 76-2 CPD 323, and may do so even in the absence of final resolution of the underlying dispute, Frank Briscoe Company, Inc., B-161283, March 16, 1976, 76-1 CPD 177. The use of this method of collection is not conditioned on whether the claim arose out of contract or otherwise. Nabisco, Inc., B-184506, October 29, 1976, 76-1 CPD 189.

Thus, an agency's use of setoff is not barred where, as here, the debtor disputes the amount that it owes or its underlying liability.

We agree with the Air Force that $41.15 may be refunded to Chandler under claim Z-2608885(15) and we deny the remaining claims.

Harry R. Van Cleve
for Comptroller General
of the United States