DECISION

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

025390

FILE: B-205084 DATE: June 8, 1983

MATTER OF: The Department of the Army--Request for Reconsideration

DIGEST:

1. Where a carrier questions whether a shipper tendered property for transportation that the shipper claims was lost, the applicable case law requires the shipper to furnish some substantive evidence of tender in order to establish a prima facie case of carrier liability.

2. A prima facie case of carrier liability is not established where the shipper furnishes no substantive evidence to support his allegation that he tendered to the carrier property that he later claims was lost.

The Department of the Army, on behalf of itself, the Departments of the Navy and the Air Force and the United States Marine Corps, requests reconsideration of our decision in Paul Arpin Van Lines, Inc., B-205084, June 2, 1982. We affirm our decision.

In our decision, we found that a prima facie case of liability against a carrier, Paul Arpin Van Lines, Inc., for the alleged loss of certain household items during transportation was not established where the only evidence of tender of those items was the member's written acknowledgment of the criminal penalties for filing a false claim. That finding was based on the fact that the record was devoid of any indication that the shipping cartons had been opened or that most of the items allegedly lost related directly to any category of items listed on the shipper's inventory. Thus, we reasoned that, even though Arpin had been responsible for packing the member's household goods, further evidence of tender was required before the burden of proof shifted to Arpin to show that it was not liable for the loss. We concluded that, under those circumstances, the Army improperly subtracted the member's claim for the lost items from money otherwise owed Arpin for the transportation of the member's household goods.

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The Army challenges our decision on several grounds. First, the Army asserts that our conclusion is contrary to the preponderance of the applicable case law, which the Army believes places the burden of proof with the carrier, and to agreements between carriers and the Government. The Army cites Schnell v. The Vallescura, 293 U.S. 296 (1934), in support of this assertion. The Army also believes that, as a practical matter, our decision places an onerous burden on the shipper since the best evidence of the items tendered is the inventory of the shipper's household goods, which is prepared by the carrier and thus out of the shipper's control. On the other hand, requiring the carrier to list every household item on the inventory, the Army continues, would be time-consuming and costly. Finally, the Army states that our decision will encourage the pilfering by carriers of items too small to be listed on the inventory since carriers will no longer be deterred by the risk of liability. We believe, however, that the Army misconstrues our decision.

We did not intend by our decision to place an onerous burden on the shipper or to require the shipper to offer absolute proof of tender. Rather, our reading of the applicable case law, such as Missouri Pacific Railroad Co. v. Elmore Stahl, 377 U.S. 134 (1965), led us to the conclusion that where the issue of whether goods were tendered is raised, as was raised by Arpin, the shipper must present at least some substantive evidence of tender as an element of his prima facie case against the carrier. Id. at 138. In this regard, we note that Schnell v. The Vallescura, an admiralty case, did not concern the question presented in this case but instead centered on the issue of allocation of the burden of proof where perishable items were tendered in good condition but later delivered in damaged condition. Thus, the case is inapplicable here.

We did not envision, as the Army seems to conclude, that adequate evidence on behalf of the shipper could be provided only by requiring the carrier to list every household item. Instead, we reasoned that the shipper would have personal knowledge of the circumstances surrounding tender and could supply a specific statement concerning the loss rather than merely a general acknowledgment of certain

criminal penalties. We believe that applicable case law supports this rationale. For instance, in Trans-American Van Service, Inc. v. Shirzad, 596 S.W. 2d 587 (Tex. Civ. App. 1980), the court, in holding that the shipper furnished sufficient evidence of tender, stated:

> "[The shipper] testified that he and his family went through their Maryland home selecting the items which they wished to ship * * * and setting these aside in designated areas which they showed to the movers. Although he did not make a written inventory of the contents of each box that * * * the movers packed, he did remember details concerning the items in question such as how or where they were packed and who packed them. He stated unequivocally that each of the items * * * were turned over to Trans-American in Maryland." Id. at 592.

In addition, there was evidence that the cartons had been opened and "re-closed with tape of a different color" before delivery at destination. Here, there is no such evidence--the record shows only that all cartons listed on the inventory were delivered; there is no assertion that the cartons had been opened before delivery.

Had the shipper here presented evidence similar to that in Trans-American, our conclusion might be different. However, the shipper has filed only a claim form, and the Army would have us infer details concerning tender merely from the shipper's written acknowledgment of the penalty for filing a false claim. Under the applicable case law, we believe that such an inference is unwarranted and does not satisfy the shipper's burden of proof.

The Army asserts that carriers contracting with the Government have agreed to liability for a missing item not listed on the inventory, as evidenced by a paragraph common to all Military Basic Tenders containing an example of the computation of the maximum amount of damages based on the weight of a large carton from which a lost item is deemed missing. We disagree. Clearly, that example applies only to the method of calculating damages and does not concern the threshold question of whether tender was made.

We affirm our decision.

Shelton J. Jocolan

for Comptroller General
of the United States