24879

**DECISION**

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

**FILE:** B-211222 **DATE:** April 15, 1983

**MATTER OF:** Overnite Transportation Company

**DIGEST:**

1. Even though Government did not take exception to delivery receipt for damage to shipment, carrier is not absolved of all liability. Delivery receipt is not conclusive and is subject to rebuttal by timely notice to carrier of later discovered damage.

2. Carrier's decision to waive right to inspect damage on basis of statement of receiving clerk based on clerk's nonexpert opinion that damage was minor is essentially a business judgment and carrier bears risk of failure to inspect damage. Carrier must demonstrate amount of damages claimed by agency is unreasonable.

3. Where agency documents the actual repairs that were necessary and the number of work hours needed for each step of the repairs and claimant does not present any evidence to refute the reasonableness of those costs, we have no basis to question labor costs in the damage claim.

Overnite Transportation Company (OTC) requests review of a GAO Settlement Certificate dated December 30, 1982, in which the GAO Claims Group disallowed its claim for a refund of $610.40. The Air Force deducted this amount from bills due OTC for the damages to an Air Force fuel tank transported from Warner Robins Air Force Base, Georgia, to Hayes International Corporation (Hayes) under Government bill of lading (GBL) No. S-0,278,736. OTC contends that the Air Force has not established OTC's liability for the damage.

The Claims Group settlement action is sustained.

OTC transported a shipment which included an aluminum tank in a crate weighing 680 pounds. The shipment was delivered to Hayes on June 28, 1979. No exception to the shipment's condition was taken at delivery, and the

025316

carrier's driver received a clear delivery receipt. On July 2, 1979, the carrier was orally advised that the tank was dented. The Air Force advises that this damage was discovered after delivery was completed. There is a dispute concerning the substance of the conversation notifying OTC of the damage. OTC asserts that it was advised that damages were minor and repairs would cost under $100. Based on this representation, OTC states it waived its right to inspect the damage because the $100 cost of repair did not justify the cost of carrier inspection. The Air Force contends that it advised OTC of the extent of the damage and did not mislead OTC. The record contains a statement by a Hayes supervisor that he and the receiving clerk visually inspected the tank, that a dent not readily apparent at delivery was discovered, that OTC was called (on July 2, 1979) and informed of the dent in the tank, and that the carrier advised Hayes to treat the dent as concealed damage and that inspection was waived. We further note that the discrepancy in shipment (DISCON) form, dated July 25, 1979, confirmed in writing this initial notice. The Air Force further advises that the tank was unloaded and remained in that location and did not come into contact with any other object while at Hayes.

Thus, the Air Force documents indicate that subsequent to delivery, damage to the tank was discovered and that promptly after discovery, the carrier was advised of the damage.

The carrier contends that this record does not demonstrate the carrier's liability and refers to the clear delivery receipt as support for its contention that the damage occurred after delivery. OTC also argues that only because it relied on the Air Force representation that the damage was minor, did it waive its right to inspect the damage. Finally, OTC contends the repair bill of $610.40 was excessive.

To establish carrier liability, the primary burden is on the person asserting the claim (Government) to prove that damages actually occurred while the goods were in possession of the carrier sought to be held. Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134 (1964); Western Carloading Co., Inc., B-183483, November 29, 1976. In concealed damage cases, the claimant (Government) must establish that neither the shipper nor the consignee could have been responsible for the damage and that as a matter of logical deduction,

the loss must have occurred while the goods were in the carrier's possession. Elder & Johnson Co. v. Commercial Motor Freight, 115 N.E.2d 179 (Ct. App. Ohio 1953); Western Carloading Co., Inc., supra.

Regarding the prima facie case of carrier liability, we have held that a delivery receipt is not conclusive and does not prevent proof of damages by other means. Even though the receipt was not excepted to, it is subject to rebuttal by timely notice to the carrier of later discovered damage. Trans Country Van Lines, Inc., 57 Comp. Gen. 170 (1977); Paul Arpin Van Lines, Inc., B-193182, December 12, 1978. Acceptance of a shipment does not waive a shipper's rights to recover for concealed damage. Trans Country Van Lines, Inc., supra.

While OTC states that there was improper delay in discovering the damage, we note that our decisions have permitted a reasonable time to discover concealed damage. OTC admits that Hayes telephoned OTC after delivery and advised OTC of the damage within 4 days of discovering the concealed damage. The agency also reports the tank was not moved from the place where it was unloaded until after the damage was discovered and had not collided with any other object. A DISCON report was issued on July 25, 1979, confirming the damage in writing. Evidence of this nature has been considered sufficient to rebut a clear delivery receipt. Trans Country Van Lines, Inc., supra; Pacific Intermountain Express Co., B-194116, April 9, 1979; Paul Arpin Van Lines, Inc., supra; Lee Way Motor Freight, Inc., B-185283, June 22, 1978.

With regard to the waiver of the inspection based on the representation that damage was minor, it was the carrier's decision to waive the inspection, and while it now claims it would not have waived the inspection had it known the repair bill would be $610, obviously, a primary purpose of the carrier's right to inspect is to investigate the circumstances of the damage, to verify the extent of damage, and to estimate repairs using its own technical staff, if it decides this is necessary. Thus, its waiver was a business judgment to accept the nonexpert opinion of the receiving clerk that the damage was minor. It appears reasonable to conclude that until the Air Force's experts examined the damage to the tank and the Air Force actually went forward with repairs, the Air Force would not know the precise cost

of repairs. In fact, here, the repair work involved uncrating, lifting and movement, to uncover and repair the damage. The extent of the work required probably was not known to the representative notifying OTC of the damage. Thus, in our view, the carrier must show the amount of damages claimed is unreasonable.

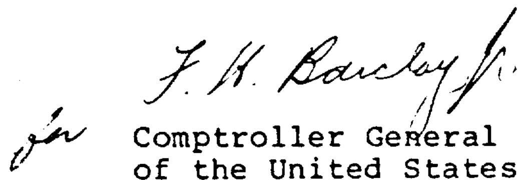
We also note that where a carrier waives the inspection, both the carrier and Air Force agree that a rule of the Motor Carrier Freight Claim Rule Book concerning inspection rules governs. Rule No. 5 provides that:

> "In the event carrier does not make an inspection as the result of a waiver or for any other reason the consignee shall make the inspection and record all information to the best of their ability pertinent to the cause. Consignee inspection, in such case, will be considered as the carrier's inspection and will not jeopardize any recovery the consignee is due based on the facts contained in the report."

Thus, in these circumstances, the carrier is bound by the shipper's damage inspection findings.

Furthermore, regarding the reasonableness of the repair bill, especially the labor charges and incidental expenses, the Air Force repair facility has submitted the actual repairs that were necessary and the number of work hours that was needed to perform each step of the repairs. OTC has not presented any evidence challenging the reasonableness of the costs other than pointing out that recrating of the tank took one-half hour longer than uncrating. Under these circumstances, we have no basis to question the labor costs under the repair damage claim. See Pacific Intermountain Express, Co., supra. It is also well settled that the liability of the carrier for the costs of repair includes reasonable and necessary incidental expenses incurred, including transportation to and from the repair area. Pacific Intermountain Express, Co., supra.

We sustain the Claims Group's settlement action denying OTC's claim for a refund of $610.40.



Comptroller General
of the United States