

DECISION



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

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FILE: B-213836

DATE: March 13, 1984

MATTER OF: Dewitt Freight Forwarding

DIGEST:

1. Interpretation by the Military Traffic Management Command of released valuation provision to mean use of gross weight in calculation of released valuation, which has been regularly applied for several years, governs meaning of that provision in tender covering movement of unaccompanied baggage.
2. Where the claimant questions the allegation of the agency that the weights set forth in the Joint Military/Industry Table of Weights are net weights but presents no evidence, the claimant has failed to sustain the burden to furnish evidence to establish its claim.

Dewitt Freight Forwarding (Dewitt) requests review pursuant to 4 C.F.R. § 32 (1983) of the denial by our Accounting and Financial Management Division, Claims Group, of a claim for refund of part of the amounts collected by set-off for damage in transit to several items of household effects of SSgt. Ronald J. Morey transported as unaccompanied baggage from Torrejon de Ardoz, Spain, to Langley Air Force Base, Virginia, under Government bill of lading No. S-2023686, dated November 23, 1981.

We sustain the denial of the claim.

The baggage was picked up by the carrier in Spain on November 27, 1981, and delivered at destination on January 12, 1982, after temporary storage-in-transit. On delivery at destination, damage was noted to six packaged items and to two unpackaged bicycles. For this damage, the Air Force originally claimed \$235.80. The Air Force reports that this amount was based on the agreed released valuation of 60 cents per pound per article at the gross weight of the shipment. Dewitt offered \$128 on the basis of the actual costs of repair to one of the bicycles plus the released valuation on the packaged items computed on the weights in the Joint Military/Industry Table of Weights (weight table). The Air Force adjusted the claim to \$234.60 and,

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upon the failure of Dewitt to pay damages in the full amount claimed, the claim was referred for recovery by setoff. The claim was again adjusted to \$295.44 and recovered by setoff. Dewitt claimed refund of the difference, \$60.84, between the amount recovered by setoff and the interim claim of \$234.60.

The amount of \$295.44 was computed on the following bases: the actual amount of damages to one bicycle and to four items in two shipping containers; the released valuation for a second bicycle which was computed on the basis of the agreed weight table, and the released valuation of two commodities in shipping containers which was computed on the basis of the constructive gross weight. The dispute involves the use of gross weight to compute the released liability for the two commodities in shipping containers. The shipping manifest did not set forth the weights of the cartons or of the items. The cubic measurement of the shipping container is specified. Consequently, the gross weight was computed on the basis of 11 pounds per cubic foot of the shipping container. However, the shipping manifest also set forth specifically each item contained in each shipping container.

Dewitt contends that since the items are individually identified, the Air Force has improperly computed released valuation on the gross weight of the shipping container. Dewitt asserts that when the items in the cartons are individually identified on the inventory, the weights set forth for each item in the weight table are mandatory.

The Air Force contends that the Table of Agreed Weights sets forth net weights which are not applicable on a Code J shipment and certain other shipments not here relevant. A Code J shipment, as in the present instance, is an international shipment of baggage in which the common carrier takes responsibility for the through shipment by land, air and land, and provides packing and pickup at origin, surface transportation to a Military Air Command (MAC) aerial port, surface transportation from the MAC destination aerial port to final delivery point, and partial unpacking. See DOD 4500.34R,C22,2001am(2)9i).

For a number of years the Code J shipments have been covered by the unaccompanied baggage military basic rate tenders. The shipment which is the subject of this claim was covered by Military Basic Tender No. 2-B, I.C.C. No. 7 (MBT 2-B), effective on and after January 1, 1981. MBT-2-B is published by the Household Goods Forwarders Association

of America, Inc., an association representing household goods carriers, and participated in by DeWitt.

The liability of the carrier for loss or damage in transit is set forth in Item No. 10 of MBT 2-B, which states, "All rates in this tender apply on shipments when released to a value not exceeding 60 cents per pound per article." The item, however, does not specify whether gross or net weight is to be used for the computation of the released valuation. Therefore, when in 1977 the construction of this provision came into question concerning use of the gross or net weight of an item for the computation of the released valuation, the Military Traffic Management Command (MTMC) determined that since all other references to weight in the tender were to gross weight, gross weight also applied to the determination of the released valuation. The Air Force asserts, and DeWitt does not deny, that this construction has been in use without serious question by the agent of the household goods carriers, the Household Goods Forwarders Association of America, Inc., or any of the participating carriers until the present time.

The practical construction, conduct or practice of the parties to a contract will generally govern the construction of provisions of the contract when later questioned. See 17A C.J.S., Contracts § 325(1), 17 AM. Jur.2d., Contracts § 274. Since the released valuation provision has been applied on gross weight for approximately 6 years without objection by DeWitt, either individually or through the tender publishing agent, it will govern the application of the provision on the present claim.

In support, however, of its contention, DeWitt refers to a circular letter of June 6, 1983, from MTMC to the household goods carriers associations defining the terms "packing carton", "shipping container", and "item or article", and stating, in effect, that if a carrier lists a shipping container, which is the external container into which is placed individual items of baggage or smaller cartons containing items of baggage, as a single item without identifying the items in the container, liability for loss or damage will be computed on the gross weight of the shipping container. This letter also states that it is a result of the annual negotiations held on February 18, 1983. DeWitt also furnished a copy of a letter from the Household Goods Forwarders Association of America, dated June 28, 1983, and quoted from that letter the following:

"At a final meeting held with the military claims representatives on June 20, 1983, it was agreed that the revised Table of Weights would

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have application on unaccompanied baggage shipments, if such shipments are inventoried the same as household goods shipments."

Therefore, as a result of negotiations in 1983, the military agreed with the household goods carriers that when items are individually identified on the inventory, as here, the agreed table of weights would apply on items of unaccompanied baggage.

The present shipment, however, was accepted by the carrier on November 27, 1981, and was delivered at destination on January 12, 1982. This contract of carriage, therefore, came into existence and was fully performed prior to the revised agreement. The June 28, 1983, letter of the Household Goods Forwarding Association, on which Dewitt relies, expressly states: "The current Table of Weights has an exception so that it does not apply to unaccompanied baggage or DPM shipments." Dewitt has neither alleged nor shown that the 1983 agreement has any application to a 1981 contract.

In additional support of its contention, Dewitt states that use of the gross weight ". . . would make the carrier pay a claim on the weight of the container, as well as the contents," and the shipping containers are generally the property of the carrier. However, it is not the weight of damaged goods that is being determined, but the measure of the released valuation. We cannot say that the use of the gross weight of the loaded shipping container for that determination is any less reasonable than for the determination of charges under the tender, and MBT2B expressly provides that all charges based on weight are based on gross weight.

Dewitt also questions the assertion by Air Force that the weights set forth in the weight table are net weights. However, no evidence to the contrary has been presented. A claimant bears the burden of furnishing evidence clearly and satisfactorily establishing its claim and all incidental matters to establish the clear legal liability of the United States and the claimant's right to payment. See 31 Comp. Gen. 340 (1952) 18 Comp. Gen. 980 (1939). Dewitt has failed to sustain the burden of evidence.

Therefore, we sustain denial of the claim.

for 
Comptroller General
of the United States