TIMPLE

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fogarty Van Lines

File: B-235558

Date: December 19, 1989

DIGEST

A carrier does not overcome the government's prima facie case of liability against it for damaged property by asserting that the property owner, who did not allege the damage until after delivery, denied the firm the right to inspect in the stipulated time period, where the owner denies the carrier's assertion and the carrier did not meet its obligation to pursue its inspection right vigorously once it perceived that the owner would not cooperate.

DECISION

Fogarty Van Lines requests that we reconsider our Claims Group's denial of the firm's claim for reimbursement of $1,691.79 that the Air Force set off from amounts otherwise due Fogarty after payment to Major Gregory Alston for damage to the member's household goods. Fogarty maintains that Major Alston prevented it from inspecting household goods that he alleged, after delivery, the carrier had damaged, and that the Air Force refused to help Fogarty exercise its right to inspect. Fogarty argues that its liability therefore should be limited to those items noted as lost or damaged at delivery.

Our Claims Group found that the primary reason Fogarty did not inspect was the carrier's own failure to insist on its right to do so, and disallowed the claim. We affirm the Claims Group's decision.

BACKGROUND

In June 1987 Fogarty's agent, Clark Van Lines, transported Major Alston's household goods from Montgomery, Alabama, to his new quarters near Langley Air Force Base, Virginia. When the shipment was delivered on June 26, Major Alston and

Clark's representative signed Form 1840 (Joint Statement of Loss or Damage at Delivery), noting on it that various items were damaged.

On August 10, 1987, Major Alston submitted a claim to the Air Force for damaged and lost household goods, including items not noted at delivery, and the Air Force subsequently advised Fogarty of its subrogation claim. By letter of September 1, Fogarty notified the Air Force of its intention to inspect the alleged damage, noting "we have until September 24th, or 45 days after the DD-1840R was dispatched."

In a September 29, 1987, letter, Fogarty advised the Air Force that Major Alston would not allow the carrier's repairman to inspect the items claimed. The carrier denied liability for the additional items on the basis of the member's alleged refusal to permit inspection.

ANALYSIS

A prima facie case of carrier liability is established by showing that the carrier failed to deliver goods to the destination in the same quality or quantity as received by the carrier at origin, and the amount of damages. The carrier, to relieve itself of liability, must show that it was free from negligence and that the damage was due solely to an act of God, a public enemy, the shipper, the public authority, or the inherent nature of the goods. Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134 (1964).

The industry and the Department of Defense have agreed to certain loss and damage rules for application when damages are not discovered until after delivery.1/ The agreements give a carrier 45 days to inspect damage for purposes of ascertaining its liability where written notice of loss or damage is sent to the firm within 75 days after delivery. If the carrier does not inspect within the agreed-upon time, the firm is deemed to have waived the inspection right.

The dispute here involves an issue of fact: whether Major Alston prevented Fogarty from inspecting, or whether the carrier effectively waived the inspection. In Continental Van Lines, Inc., B-215559, Aug. 23, 1985, we stated that

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1/ Military-Industry Memorandum of Understanding that became effective for domestic household good shipments on October 1, 1985, and Military Traffic Management Command Household Goods Domestic Rate Solicitation 7-4, Item 25 (May 1, 1987).

there may be situations in which a carrier properly could deny liability for alleged damages if the carrier were denied the chance to inspect that damage. Where there has been no denial of the inspection right, however, and the carrier presents nothing else to rebut the prima facie case of liability, the firm is responsible for the damage in issue.

Fogarty, which knew it had until September 24 to inspect, has furnished a statement from its repairman that he telephoned Major Alston on September 21 to arrange an appointment, but the member denied him the chance to inspect, advising him that the claim had been settled, that he had been reimbursed, and that some of the damaged goods already had been repaired. The Air Force, however, says that Major Alston has indicated that although he did tell the caller the status of the claim as of that time, at no time did he deny Fogarty's agent the right of inspection.

It is not clear from the record exactly what transpired in the contact between Fogarty's repairman and Major Alston. It is clear, however, that neither Fogarty nor its agent contacted Air Force officials between September 21 and 24 for assistance in securing the member's cooperation. In Continental Van Lines, Inc., B-215559, supra, we acknowledged that an agency has an obligation to inform its members of a carrier's right to inspect damaged property, but we also suggested that this can be accomplished, generally, by regulation.2/ We also stated that the carrier has a concurrent obligation to pursue its right of inspection vigorously when the property owner does not respond properly to the government's instruction.

Nothing in the record here suggests that Fogarty met its obligation to pursue its inspection right within the stipulated time once its repairman perceived that Major Alston was denying access for inspection purposes. The carrier has failed, for example, to explain why it did not immediately contact Air Force officials to arrange for the inspection of the items in issue before September 24. While we understand that time was short, we also note that Fogarty had waited until 42 of the 45 allotted days had passed before asserting its inspection prerogative.

It is unfortunate that Fogarty's waiver of its inspection right may have been unknowing, based on a misunderstanding between the member and the carrier's repairman.

2/ See Air Force Regulation 112-1, para. 6-17(d) (Change 1, Mar. 20, 1984).

Nevertheless, there is no requirement that inspection have been knowingly waived, see IML Freight, Inc. B-193101, Mar. 12, 1979. Accordingly, and in light of the prima facie case against the carrier and Fogarty's failure to pursue its inspection right further before September 24, we see no basis on which to question our Claims Group's finding that the damage properly must be presumed to have occurred while the items were in Fogarty's custody and did not result from an excepted cause.

Our Claims Group's decision is affirmed.

Shelton J. Jordan

for Comptroller General
of the United States