092162

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

B-176881 40215 November 21, 1973

Murphy Motor Freight Lines, Inc.
P.O. Box 3640
Saint Paul, Minnesota 55165

Attention: James Haberkorn
Director of Quality Control

Gentlemen:

By your letter of October 12, 1973, you request reconsideration of our decision of June 7, 1973, B-176881, 52 Comp. Gen. _____, sustaining the setoff of $1,144.65 in freight charges against a damage claim of $6,902.23 in the shipment of four sets of switches (consisting of 33 pieces) by Garrett Freightlines and Murphy Motor Freight Lines, Inc., from Coulee Dam, Washington, to Granite Falls, Minnesota, under Government bill of lading D-5067224, dated November 19, 1969.

In that decision, we noted that you did not seek to rebut the prima facie case of carrier liability established by the shipper, the Bureau of Reclamation, Department of the Interior. The burden was, thereby, shifted to the carrier to prove that it was not negligent and that the alleged negligence of the shipper (i.e., improper loading) was the sole cause of the damage to the shipment. See Missouri Pacific Railroad Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964). This Office then assumed, arguendo, that the shipment was improperly loaded by the shipper and that this was the proximate cause of the damage. Nevertheless, your corporation was held liable for the damage because it failed to offer any proof tending to show that the loading defect was latent and concealed and not discernible to the ordinary observation of the carrier's agent. United States v. Savage Truck Line, Inc., 209 F. 2d 442, 445 (4th Cir. 1953), cert. denied, 347 U.S. 952 (1954). Moreover, it was apparent from your letter of November 9, 1971, to the Bureau of Reclamation, that an agent of Garrett Freightlines had not only the opportunity to observe and inspect the packing and loading of the shipment, but actively participated in the loading of the shipment.

In your request for reconsideration, you again assert that the damage to the switches was caused by the improper loading of the shipper. As in our earlier decision, even if we assume that the shipper were negligent and that this negligence proximately caused

[Request for Reconsideration of Setoff]

176881

the damage to the shipment, the carrier still cannot recover, for your corporation has submitted no proof tending to establish either its own freedom from negligence or the latent and non-discernible character of the loading defect. L. E. Whitlock Truck Service, Inc. v. Regal Drilling Co., 333 F. 2d 488, 491 (10th Cir. 1964); Armour Research Foundation of Illinois Institute of Technology v. Chicago, R. I. & P. R. Co., 297 F. 2d 176, 178 (7th Cir. 1961); United States v. Savage Truck Line, Inc., supra, at 445; 46 Comp. Gen. 740, 745 (1967). Absent evidence to the contrary, it is only reasonable to assume that Garrett's driver, who assisted in the loading process, should have discovered any negligence that might have occurred in the preparation and loading of the shipment.

The carrier now asserts that the defect in loading was not apparent to the Garrett driver when the shipment was loaded. However, the carrier has provided this Office with no evidence to support this contention. Without further proof, this bare allegation cannot be accepted, particularly in light of the established fact that the driver participated in the loading of the shipment.

You also contend that the Government personnel present at the time of loading would have been in the best position to determine how the switches should have been placed and secured in the trailer to keep them from becoming damaged during normal road movement. If this contention were sustained, it would have the effect of placing upon the shipper the burden of loss in all cases where the shipper assumes responsibility for loading the shipment. This is contrary to the well-established principle of United States v. Savage Truck Line, Inc., supra, at 445:

"The primary duty as to the safe loading of property is therefore upon the carrier. When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. This rule is not only followed in cases arising under the federal statutes by decisions of the federal courts but also for the most part by the decisions of the state courts."

Furthermore, such a conclusion conflicts with the rationale underlying the Supreme Court's decision in Missouri Pacific Railroad Co. v. Elmore & Stahl, supra, at 143-44:

> "* * * The general rule of carrier liability is based upon the sound premise that the carrier has peculiarly within its knowledge [a]ll the facts and circumstances upon which [it] may rely to relieve [it] of [its] duty . . .. In consequence, the law casts upon [it] the burden of the loss which [it] cannot explain or, explaining, bring within the exceptional case in which [it] is relieved from liability.' Schnell v. The Vallescura, 293 U.S. 296, 304. * * *"

Finally, you state that it is your understanding that insulators are normally shipped separately, packed in wooden crates. And you also state you have been informed that similar damage has occurred on other shipments of switches. Nevertheless, even if true, these contentions provide no defense for the carrier. The most that can be deduced from these allegations is that the shipper was negligent. However, for purposes of this decision, the shipper's negligence has been assumed. Your corporation still has not met its burden of proof on the issues of its own negligence and the discoverability of the loading defect.

The legal principles in loss and damage cases strongly favor the shipper. Once the shipper has established a prima facie case, the carrier must prove that it was not negligent and that one of the exceptions to carrier liability was the sole cause of the loss or damage. Admittedly, this is a difficult burden of proof. Nevertheless, bare allegations, unsupported by extrinsic evidence, will not support a carrier's claim. The carrier must come forward with concrete evidence to substantiate its contentions and our records indicate a failure on your part to produce such evidence.

Our decision of June 7, 1973, B-176881, 52 Comp. Gen. _____, is accordingly affirmed.

Sincerely yours,

Paul G. Dembling
Comptroller General
of the United States