

**DECISION**



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

50971

FILE: B-183243

DATE: AUG 12 1975

MATTER OF: Flying Tiger Line, Inc.

97495

**DIGEST:**

Air carrier is liable for damages sustained to shipment of Government property notwithstanding contention of improper packing, since applicable tariff filed with CAB provides that acceptance of shipment constitutes prima facie evidence of proper packing and puts burden of proof on carrier to show absence of negligence. Issue of liability is determinable under provisions of tariff; common law rules and presumptions apply only when not in conflict with tariff.

Flying Tiger Line, Inc. (Flying Tiger) has presented a claim for refund of \$2,255.94, administratively deducted by the Department of the Army for damage to a shipment of office machines transported by Flying Tiger under that company's air waybill 023/2790-1915 but apparently converted to Government bill of lading H-6234799 at destination.

It appears that the shipment of office machines moved from Portland, Oregon, by air via Flying Tiger to Cleveland, Ohio, and then by truck via Quick Air Freight, Inc. (Quick Air) to the Defense Construction Supply Center, Columbus, Ohio. It is undisputed that the shipment was received in a damaged condition with repair and replacement costs estimated by the Army at \$2,255.94.

The Army in effect alleges that mishandling by Flying Tiger was the proximate cause of damage to the shipment. Flying Tiger, on the other hand, bases its denial of liability on improper packaging by the shipper. Relevant facts do not appear to be in dispute: the shipment was received in apparent good order by Flying Tiger in Portland, Oregon, and received in a damaged condition by Quick Air at the Cleveland airport. Quick Air's PRO No. H-32326 states on its face:

"NOTE  
CARTON [sic] WERE POORLY PACKED  
AND IN CRUSHED CONDITION."

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Therefore, it seems obvious that the shipment was damaged between the time Flying Tiger took possession in Portland, Oregon, and the time Quick Air took possession of the shipment at the airport in Cleveland from Flying Tiger.

Unlike the Interstate Commerce Act (see 49 U.S.C. § 20(11) (1970)), the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq. (1970) does not contain a codification of the common law rules of carriers' liability for loss or damage to goods in carriage. See Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134 (1964).

However, it has long been held that to the extent that applicable tariffs filed with the Civil Aeronautics Board (C.A.B.) are valid they constitute the contract of carriage between the parties and are "conclusive and exclusive," Tishman & Lipp, Inc. v. Delta Air Lines, 413 F. 2d. 1401, 1403 (2nd Cir. 1969); Lichten v. Eastern Airlines, Inc., 139 F. 2d. 939 (2nd Cir. 1951). Therefore, in the instant situation we must resort first to the rules of the governing air tariff in determining the liability of the parties with resort to common law rules and presumptions only where such common law rules and presumptions do not conflict with applicable tariff provisions. See Modern Wholesale Florist v. Braniff International Airways, Inc., 350 S.W. 2nd 539 (1961).

The Official Air Freight Rules Tariff No. 1-B, C.A.B. No. 96, to which Flying Tiger was a party at the time of the subject freight movement states:

"Shipments must be so prepared or packed as to insure safe transportation with ordinary care in handling. Carrier acceptance of the shipment shall be prima facie evidence of the shipper's compliance with this paragraph."  
(Rule No. 14)

Further, Rule No. 30(A)(2) thereof states:

"The carrier shall not be liable for loss, damage, deterioration, destruction, theft, pilferage, delay, default, misdelivery, non-delivery, or any other result not caused by the actual negligence of itself, its agent, servant or representative, acting within the

scope of their authority, or not occurring on its own line or in its own service, or for any act, default, negligence, failure or omission of any other carrier or any other transportation organization, provided that, upon proof by shipper that the shipment was received by the carrier in an undamaged, disease-free, and proper shipping condition, and was lost, damaged, deteriorated, destroyed, stolen, pilfered, delayed, misdelivered or not delivered, while in carrier's possession, carrier shall have the burden of proving that such loss, damage, deterioration, destruction, theft, pilferage, delay, misdelivery or non-delivery was not the result of its negligence." (Emphasis supplied.)

Pursuant to Rule No. 14, supra, Flying Tiger's acceptance of the shipment constitutes prima facie evidence that the shipper adequately packed the shipment. Although, as noted above, Quick Air's receipt contains a notation that the cartons were poorly packed, there is no suggestion that Quick Air based this conclusion on any evidence other than mere observation of the crushed condition of the cartons. Therefore it appears that Quick Air's conclusion of poor packing is not substantiated by the record and does not rebut the prima facie evidence of adequate packing by the shipper.

Other than the Quick Air notation discussed above, the record is devoid of substantive evidence tending to suggest that the shipment was not adequately packed. Mere allegations of improper packing (by Flying Tiger) unsubstantiated by evidence does not suffice to rebut prima facie evidence of adequate packing.

With the Army having established receipt of the shipment by the carrier in good condition, adequate packing by the shipper, and receipt of the shipment by the consignee in damaged condition, Rule No. 30(A)(2), supra, controls and puts the burden on the carrier of proving that such damage was not due to its negligence.

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Flying Tiger has offered virtually no evidence to meet this burden of proof. Accordingly, since Flying Tiger has failed to sustain the burden of proving that it was not negligent, as required by Rule No. 30(A)(2), its claim for a refund of \$2,255.94 is denied.

R. F. KELLEY

[Deputy] Comptroller General  
of the United States