



ENERGY, UTILITIES, TELECOMMUNICATIONS & TRANSPORTATION LAW

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Fact questions as to "good order" of cargo at origin and the shipper's duty of mitigation bar summary judgment in cargo claim litigation

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U.S. District Judge William Griesbach refused to grant summary judgment in cargo loss and damage litigation in *Land O'Lakes, Inc. v. Superior Service Transportation of Wisconsin, Inc.*, 500 F.Supp. 2d 1150 (E.D. Wis. 6/27/07). Land O'Lakes ("LOL") produced butter at a Monroe, WI plant. In March 2005, LOL shipped 40,000 lbs. of butter from Monroe, WI to Costco at a

warehouse in New Jersey. Costco had paid \$66,348.45 for this butter. LOL tendered this load to Superior under a 2004 contract with Superior wherein Superior agreed to accept common carrier Carmack Amendment liability under 49 U.S.C. §14706 regardless of whether the tendered traffic was moving in interstate commerce. The LOL/Superior contract further provided that if LOL's branded or labeled goods were damaged, LOL had sole discretion to determine whether those goods were salvageable and the value of the salvage with salvage receipts credited against LOL's damage claim against Superior.

Although Superior had contracted with LOL to move the load, Superior did not move the load itself and instead tendered the load to broker Town Center Logistics ("TCL"). TCL in turn tendered the load to carrier Runabout Express ("RE"). RE signed the bill of lading accepting the load at origin on March 18, 2005. But RE's truck crashed in Pennsylvania en route to New Jersey. Although RE's driver suffered serious

injuries and his cab was severely damaged, the trailer suffered relatively minor damage. RE's cargo insurer, Owner Operator Services ("OOS"), hired an adjustor who inspected the trailer on March 24, 2005 and noted that while the trailer had been dented, it remained intact and its cooling unit remained operational. The adjustor found the cargo of butter remained in their cardboard containers, wrapped in plastic and that while some boxes were dented or deformed, much of the butter appeared undamaged.

OOS then contacted LOL and requested that LOL take the butter back for resale given its largely undamaged state. LOL, however, failed to respond to OOS's inquiry so OOS sold the butter as salvage for \$29,101.25. OOS then deposited those funds in an interest bearing account. In the meantime, LOL had shipped a whole new truckload of butter to Costco in New Jersey. LOL then demanded payment from Superior, RE or OOS for the \$60,000 plus original invoice price. When

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Superior and RE refused to pay, LOL brought suit.

Judge Griesbach first noted the elements of a Carmack Amendment claim included delivery of the cargo in good condition to the carrier, loss or damage on delivery, and the amount of the damage. The Judge then reviewed 49 U.S.C. §14706 and noted that both the initiating carrier and the delivering carrier had liability to the beneficial owner of the lost or damaged goods. Once a shipper established its prima facie case, the burden switched back to the motor carrier to establish that it was free from negligence and the loss resulted from one or more of the traditional Carmack defenses such as Act of God, the public enemy, act of shipper, public authority or an inherent vice or nature of the goods.

LOL moved for summary judgment, arguing that Superior had agreed to move the load and that RE accepted the load in good condition. Due to the crash, the cargo was never delivered and LOL sought recovery of the invoice value of the cargo or \$66,348.45. Superior argued that it had no liability as it never touched the goods. It did not accept tender of the load, it did not issue a bill of lading, and it did not provide transport. TCL brokered the load to RE. LOL responded by referring to its contract with Superior which provided that Superior could only broker LOL loads with LOL's consent and if Superior held broker authority. Superior, however, held no such authority so it had no right to broker the load and acted as a carrier when it tendered the load to the broker.

Judge Griesbach then went on to find that Carmack Amendment liability extended beyond the carrier who actively transported the goods to include any carrier who "provided transportation or service." Although Superior did not provide direct transport, the District Court found that Superior arranged for the transport via RE through broker TCL and that Congress defined "transportation" in 49 U.S.C. §13102(23)(B) as including "services related to ... movement," including "arranging for" receipt and delivery. Given that Superior's contract with LOL entitled Superior to receive payment for its services and the foregoing statutory definition of "transportation," the District Court rejected Superior's argument that it had no Carmack

Amendment liability.

The District Court next addressed whether LOL had established the necessary element that the cargo was in good condition on its initial tender to RE. RE argued that LOL had not established this element because LOL had failed to follow its loading practice of sealing the RE trailer after it was loaded in this instance. The District Court rejected RE's claims as to the absence of a seal, noting LOL's burden was to show that the cargo was in good condition on tender to the carrier at origin, not that the cargo was not sealed at origin or in transit.

The District Court did not focus on the seal issue and remained focused on the first element of LOL's claim, that being the condition of the cargo on tender to RE. The Court found that RE's driver had signed the bill of lading and thereby warranted that to the best of RE's knowledge "the property is in good order." Although the signed bill of lading at origin is "some evidence" of the cargo's "good order," the District Court cited *Allied Tube & Conduit Corp. v. Silac Transp. Co.*, 211 F.3d 367, 271 (7th Cir. 2000) for the proposition that a signed bill of lading was insufficient to establish a prima facie case that an entire shipment had been properly received by the motor carrier. The Court cited other precedent holding that while direct evidence of a shipper tender of cargo in good order "was often not available," the shipper must still offer evidence of its general procedures for preparing and tendering its shipments. The Court found that LOL's affidavits and proofs did not address this essential element of its case and therefore LOL's motion for summary judgment was denied.

RE also claimed that the cargo remained undamaged after the crash and therefore it had no liability for that butter. While RE admitted that 20 percent of the butter was "deformed" due to the crash, RE contended that after the crash all of the butter remained unexposed to the elements, wrapped in plastic, encased in cardboard boxes, and in a trailer whose reefer unit continued to work. Given all these facts, RE argued that LOL's "total loss" claim was a sham. But the District Court rejected RE's claim. The Court found that RE had disregarded the fact that where goods tendered to a carrier for transport are not delivered, the carrier

should be liable for their fair market value or, in this action, the price Costco had agreed to pay for the butter.

The District Court next addressed LOL's damages and whether the non-delivery entitled LOL to summary judgment for the invoice value that Costco had paid for the butter. The Court first found that RE's evidence supported its Affirmative Defense that LOL failed to mitigate its loss. The Court noted that a shipper must take reasonable efforts to reduce the amount of its loss, like any other contracting party. RE argued that LOL unreasonably failed to respond to its requests that LOL should retake and resell the salvaged butter, noting that LOL frequently reuses butter that had been crushed or squashed in its own warehouse. The District Court added that the duty to mitigate is premised on the practical consideration that a shipper in the business of dealing with the cargo in issue would better know how to sell it for its best price than a carrier.

LOL responded by asserting that as the goods were out of its control and out of RE's control after the crash, it could not resell the butter due to the larger risk of contamination. The District Court found that notwithstanding LOL's arguments, RE's evidence that 80 percent of the cargo remained undamaged was sufficient to create an issue of fact as to whether LOL had taken reasonable steps to mitigate its damages. The District Court found that a jury could find that even if LOL acted out of concern of potential biohazards or contamination, LOL may have been too cautious and therefore unreasonable in its mitigation efforts. As the District Court found the summary judgment record was insufficient to resolve this issue, it refused to grant LOL summary judgment.

This decision is significant in two respects. First, it finds that a carrier who does not touch a load can still have Carmack Amendment liability on that load where it contracts with the shipper to move the load and arranges for the load's movement via another carrier through a broker. Second, the District Court imposed a high shipper burden of mitigation on a load of foodstuffs that was unattended after a crash. If the case ultimately went to trial, it will be interesting to see how the 7th Circuit addresses these issues should either party take an appeal.