

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 22, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-2658

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CON-WAY CENTRAL EXPRESS, INC.,

Plaintiff-Appellant,

v.

SUPER VALU STORES, INC.,

Defendant-Respondent.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed in part, reversed in part and cause remanded with directions.*

Before Snyder, P.J., Brown and Anderson, JJ.

BROWN, J. Con-Way Central Express, Inc., brought a collection action against Super Valu Stores, Inc., for past due freight and "accessorial" services. Accessorial services are extra services that Con-Way performs for the recipient, such as sorting the delivered goods and providing

advance notice of the delivery time. Super Valu's allegedly past due bills pertained to forty-nine deliveries that Con-Way made to Super Valu's warehousing operation between 1990 and 1992.

After a bench trial, the court rejected the vast majority of Con-Way's claims. In this appeal, Con-Way challenges two aspects of the judgment.¹

With regard to a freight charge for a shipment of plastic film, Con-Way argues that the trial court erroneously found that Super Valu did not "accept" this shipment in light of evidence that Super Valu stamped and signed a receipt.

Next, with regard to the various accessorial charges, Con-Way asserts that the trial court incorrectly ruled that it failed to meet its burden of persuasion. Con-Way alleges on appeal that its documentary evidence undeniably supports its claim for these charges.

We reverse the portion of the judgment addressing the freight charge and affirm the portion addressing the accessorial charges. We conclude that the stamped and signed receipt and the admission of a Super Valu manager that this receipt indicated that his firm was indeed liable for these charges are grounds for upsetting the trial court's finding that this delivery was never accepted. With respect to the accessorial charges, however, we affirm the trial

¹ Con-Way also appeals the trial court's postjudgment order denying reconsideration.

court's conclusion that Con-Way's documentary evidence was insufficient, standing alone, to support its case.

BACKGROUND

This case involves forty-nine separate deliveries that Con-Way made to Super Valu's distribution center between October 1990 and December 1992. Con-Way initiated this action in November 1993, seeking total damages of roughly \$10,030. The damages were segregated into three classes consisting of (1) freight charges; (2) accessorial charges; and (3) late fees incurred because Super Valu failed to make payments. On appeal, however, Con-Way has narrowed its case to two claims, a freight charge on a shipment of plastic film (roughly \$431) and various accessorial charges on other shipments (roughly \$6131).

Con-Way calculated its damages pursuant to the tariffs it filed with the Interstate Commerce Commission. As a common carrier, federal law required Con-Way to file notice of its rates for hauling and accessorial services with the ICC. *See* 49 U.S.C. § 10762, amended by ICC Termination Act of 1995, Pub. L. 104-88, tit. 1, § 102(a), 109 Stat. 803. Under ICC law, Con-Way's filing of tariffs served as public notice regarding its rates and method of calculating charges. *See Louisville & Nashville R.R. Co. v. Mead Johnson & Co.*, 737 F.2d 683, 689 (7th Cir. 1984). Thus, the legal theory supporting Con-Way's two claims is that Super Valu is liable because the rates have been properly filed with the ICC. *See Werner Transp. Co. v. Shimon*, 249 Wis. 87, 89, 23 N.W.2d 519, 520 (1946) ("the consignee is the presumptive owner of the goods transported

and if he accepts the goods in the capacity of owner *the law implies a promise on his part to pay the charges.*") (Emphasis added.)

FREIGHT CHARGE ON PLASTIC FILM

The trial court found that Con-Way "failed to establish sufficient evidence to show" that Super Valu "ever accepted" this shipment of goods. Accordingly, it ruled that Super Valu was not liable for the freight fees related to this shipment.

Con-Way's evidence supporting the freight claim consisted of a stamped receipt which bears the signature of a Super Valu employee on the line denoted "RECEVD BY." Moreover, we observe that when Super Valu's warehouse manager was shown this receipt, he acknowledged that "the way this one is set up it says Super Valu should pay the freight on this."

Super Valu's rebuttal consisted of testimony that it had a company policy against accepting collect freight shipments. Therefore, by ruling for Super Valu, it seems that the trial court determined that Super Valu's actions with regard to this shipment were not intentional, and hence, Super Valu did not knowingly accept this shipment.

Whether Super Valu accepted this collect shipment is a question of fact to be resolved by the trial court. See *Chrysler Corp. v. Adamatic, Inc.*, 59 Wis.2d 219, 233, 208 N.W.2d 97, 103-04 (1973), *overruled on other grounds by Daniel v. Bank of Hayward*, 144 Wis.2d 931, 425 N.W.2d 416 (1988). Ordinarily,

we may not set aside such a finding unless it is clearly erroneous. See § 805.17(2), STATS.

Nevertheless, our examination of the trial court's written decision shows that its factual finding rests on an improper legal standard. In matters involving common carriers, the issue of acceptance is not governed by intent. Rather, a factual dispute about acceptance is resolved by asking whether the consignee exercised "dominion and control over the shipment." See *Chicago & N.W. Transp. Co. v. Krohn Cartage Co.*, 79 Wis.2d 39, 44, 255 N.W.2d 310, 312-13 (1977). We thus conclude that the trial court reasoned incorrectly when it determined that Super Valu's intent was relevant.

Moreover, when we apply the correct legal standard to the evidence, we do not see any dispute over whether Super Valu exercised "dominion and control." At oral argument, Super Valu's counsel explained that this shipment was mistakenly sent to Super Valu's warehouse. When Super Valu learned it had the wrong goods, it contacted the manufacturer and asked where the shipment should be directed. But whatever the intentions of Super Valu, its actions demonstrate that it took the crucial step of exercising "dominion and control." Super Valu took possession of the shipment, inspected the shipment and then rerouted it to the proper company; thus, it "accepted" the shipment. See *id.* And since Super Valu accepted this shipment, it is liable for the freight charge. See *Werner Transp. Co.*, 249 Wis. at 89, 23 N.W.2d at 520. In this scenario, Super Valu's recourse for this apparently "mistaken" freight charge is not with the common carrier assigned to deliver

the shipment. Instead, Super Valu must pursue a separate claim against the shipper. See *Pacific and Atl. Shippers, Inc. v. American News Co.*, 201 So.2d 119, 121 (La. Ct. App. 1967).

ACCESSORIAL CHARGES

Con-Way also challenges the trial court's finding that "it failed to establish its case" with respect to the accessorial charges. Con-Way summarizes its appellate argument as follows:

The exhibits identify and include the tariffs which exist, and the amounts due for the various accessorial charges. With no evidence of payment for any of these charges, except \$44.10, the trial court erred in not granting judgment to the plaintiff in the sum of \$6,131.14.

We thus perceive Con-Way's position to be heavily reliant on its exhibits. Con-Way believes that they only support one conclusion, that it is entitled to judgment.

Super Valu responds, however, that Con-Way failed to meet its burden of persuasion. It argues that "Con-Way simply submitted a stack of invoices to the court and argued that since the rates charged for the various services were filed with the Interstate Commerce Commission, Con-Way was entitled to payment from Super Valu."

Although neither party has specifically discussed the appropriate standard of review, their arguments suggest that the trial court was making a factual finding when it wrote that "it appeared that in several areas [Con-Way] either failed to establish its case or the paperwork that accompanied the various

charges belied the argument [Con-Way] was making.” Neither party has suggested that the trial court ruled that Con-Way had failed to present a prima facie case that it was owed these fees, a legal determination. *See generally Preloznik v. City of Madison*, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). Rather, it appears that the trial court determined that Con-Way's proof failed to overcome Super Valu's rebuttal, a factual finding. *See generally* § 805.17, STATS. Consequently, we will turn to the record, gauge the quality of Con-Way's evidentiary presentation and determine if the trial court made a clearly erroneous finding when it ruled that Con-Way had failed to meet its burden of persuasion.

As we alluded to above, Con-Way's case centered on the records it maintained on these shipments. Con-Way arranged the documents regarding all forty-nine shipments into ten exhibits. For each shipment, Con-Way presented a copy of the final invoice it sent to Super Valu showing the amount owed for the disputed charges and corresponding late fees. Moreover, Con-Way submitted the bills of lading that accompanied each shipment. These described things such as the merchandise being shipped, where the merchandise was being sent and the applicable charges.² Furthermore, Con-Way's service manager testified and identified these documents and tried to explain to the court what they meant. For illustrative purposes, we have

² A “bill of lading” is an instrument by which goods are transferred from seller to buyer with the aid of a carrier. It describes the goods shipped, sets forth the identity of the shipper (seller) and buyer, and directs the carrier to deliver the freight to a certain location or person. *See Met-Al, Inc. v. Hansen Storage Co.*, 828 F. Supp. 1369, 1375 (E.D. Wis. 1993).

reproduced his description of the documents labeled Exhibit 3 at the margin.³ This manager also confirmed that Con-Way had not received payment from Super Valu.

After Con-Way rested its case, however, Super Valu moved for a directed verdict. Super Valu argued that Con-Way's documentary proof, standing alone, was insufficient. Super Valu emphasized the poor quality of Con-Way's evidentiary presentation, noting, for example, that Con-Way did not prove that it had sent the notice of past due charges needed to support its claim for late fees. In addition, because these late fees were not separately identified,

³ Q.Now ... look at Exhibit 3. There's one freight transaction involved there. Can you explain what that involves?

A. There was a shipment that Con-Way Central Express delivered to Super Valu, and we were instructed to notify the consignee, which we did, and charged them such; and upon arrival we were-- or we were instructed to sort and segregate or to break the shipping unit down into separate groupings per the consignee's instruction constituting a sorting and segregating charge.

Q. Is that essentially unloading the freight?

A. It's unloading freight and breaking it out of its original shipping configuration.

....

Q. Are those services part of every delivery of freight?

A. No, they're not. They're an extra service provided.

Q. Upon the request of the consignee?

A. Yes. Right. Exactly.

Super Valu argued that it was “absolutely impossible” for the court to wade through Con-Way's documents and calculate the exact damages.

Con-Way responded that its regular business practice was to send such notice and that if the late fees had to be separated from the accessorial charges, it was “an arithmetic calculation any of us could make.” The trial court, however, declined to rule on the motion, taking it under advisement.

Super Valu thus proceeded to rebut Con-Way's documentary proof. Super Valu presented testimony from its management staff, who explained its warehouse operations. This testimony revealed that Super Valu generally required the seller or manufacturer to arrange shipping and did not typically contract with common carriers (such as Con-Way) to have goods picked up and brought to it. Moreover, a Super Valu witness explained that the company never requested carriers to perform accessorial services, such as those that Con-Way claims it performed. Finally, Super Valu's witness showed the court a flaw in Exhibit 9. While Con-Way's invoice demanded \$44.10 for sorting and segregating, the bill of lading accompanying this shipment stated: “Shipment tendered to carrier [i.e., Con-Way] in a sorted and segregated manner. Deliver as Same. No charges apply.”

After Super Valu concluded its presentation, each party provided further argument. Here, Con-Way emphasized how there was “no questioning the numbers included on any of these freight bills.” Moreover, it argued that Super Valu's evidence that it had a company policy against ordering accessorial

services was not relevant because ICC law demanded that Super Valu comply with Con-Way's filed rates.

Super Valu, however, continued to argue that Con-way had failed to prove its claim. It renewed its argument that Con-Way did not show how it sent notice that these invoices were due, which is required by the terms of Con-Way's published rates. Moreover, Super Valu renewed its concern that Con-Way did not present "any breakdown" between the accessorial charges and the late fees.

The trial court filed its written findings and judgment two days later. It found for Con-Way on only one of the forty-nine shipments, a \$439.02 freight charge.⁴ The court dismissed the remaining claims.

As noted above, Con-Way has dropped its claim for the late fees. In this appeal, Con-Way only challenges the trial court's finding that it did not meet its burden of persuasion with respect to the "accessorial" charges⁵ and the hauling charge we discussed previously. We join in the trial court's conclusion that Con-Way did not present a persuasive case with respect to the accessorial charges. We affirm its decision to dismiss this claim.

⁴ Super Valu does not contest this finding.

⁵ Con-Way has also dropped its claim for the \$44.10 of sorting and segregating charges within Exhibit 9.

Our initial review of the trial transcript and the exhibits left us uncertain as to the foundations of Con-Way's claim for these accessorial charges and thus we called for oral argument. But even after our discussion with Con-Way's counsel, we still do not understand why Con-Way is entitled to these charges.

For example, a significant portion of these accessorial charges were for "notification" fees. As the parties explained to us at oral argument, in the trucking industry the recipient sometimes requests the carrier to notify it in advance exactly when it will be arriving so that loading space can be set aside. The carrier charges an extra fee for this service.

Con-Way's appellate position on these notification charges is that the tariffs it filed with the ICC and the bills that it sent to Super Valu (all of which are included in its ten exhibits) plainly explain how these charges are calculated. Thus, Con-Way maintains that it has not only established a prima facie case, but that its intensive documentary presentation is so strong that it overcomes any possible rebuttal.

But the documents are not that clear. Indeed, we questioned counsel for Con-Way regarding one of its exhibits at oral argument. We directed counsel towards Exhibit 7, which contained bills for nine different shipments, each with notification charges of \$15.35. The applicable ICC tariff that Con-Way filed contains the following statement regarding such notification fees:

[W]hen any ... shipment is subject to a request that the delivering carrier notify the consignee or any other party prior

to delivery by any means whatsoever, the charge will be \$15.35 per notification.

When prepaid bills of lading indicate notification of consignee, charges will be collected from the shipper, otherwise the charges will be collected from the consignee.

We acknowledge that the shipping documents, just as the tariff contemplates, describe that Con-Way was to provide Super Valu with notice of delivery. Thus, we agree that Con-Way has solid grounds for the claim that it is entitled to the \$15.35. The question remaining, however, is: who is responsible for paying the \$15.35?

The documents state that the freight charge was *prepaid* by the shipper. And, as we just pointed out, the documents call for notification of the consignee by Con-Way. Hence, pursuant to the second paragraph of the tariff, it seems that "such charges will be collected from the shipper" because these shipments all originated with "prepaid bills of lading."

When we inquired about our reading of this second paragraph at oral argument, counsel for Con-Way suggested that we were reading the tariff incorrectly. Counsel argued that the second paragraph only meant the freight charge, not accessorial charges, would be collected from the shipper when there was a prepaid bill of lading. Counsel contended that the accessorial charges must therefore be paid by the consignee. Super Valu's counsel maintained, however, that the shipper must pay the charges and that this is the custom of the trade in interpreting the tariff language. Super-Valu's counsel rhetorically surmised that if we were troubled by Con-Way's argument that the documents

unquestionably proved its case, then certainly we could understand how the trial court ruled that Con-Way's case was unpersuasive.

We agree with Super Valu. We will not delve into construing the above tariff to resolve what we have found to be ambiguous. The point to be made is that Con-Way placed a stack of documents before the trial court and did not go far enough to convince the trier of fact about what these documents stood for and how these documents proved its case. For example, we have scrutinized the record and can confidently say that the ambiguity we discussed at oral argument regarding the interpretation of Con-Way's tariff was never presented to the trial court, either by evidence of what the custom is in construing the tariff or by any other evidence. This failure is indicative of the remainder of Con-Way's evidentiary presentation. We noted at the beginning of this discussion that our appellate inquiry is limited to whether the trial court made a supportable ruling when it found that Con-Way failed in its burden of persuasion. What is important to our analysis is that the trial court found that Con-Way's case was confusing and unpersuasive. We cannot say that the record so positively supports Con-Way's position that this determination is clearly erroneous. We affirm the trial court's decision to reject the claim for accessorial charges.

CONCLUSION AND DIRECTIONS

We reverse the trial court's finding regarding Con-Way's claim of \$430.93 for freight hauling services on the shipment of plastic film. We direct the trial court to modify the judgment and to award Con-Way this sum.

However, we affirm the trial court's conclusion dismissing Con-Way's claim of \$6131.14 for accessorial charges. This portion of the judgment shall stand.

By the Court.—Judgment and order affirmed in part, reversed in part and cause remanded with directions.

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