

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 98-0429

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

NATIONS WAY TRANSPORT SERVICE, INC.,

PLAINTIFF-RESPONDENT,

V.

HORIZON GRAPHICS, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

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

PER CURIAM. Horizon Graphics, Inc., appeals from a judgment in favor of Nations Way Transport Service, Inc., for freight charges. We affirm.

Nations Way sued Horizon for freight charges based upon Horizon's common law liability as consignee on two shipments of newsprint to Horizon's

Wisconsin plant. Horizon used the newsprint in its work on a newspaper insert for World Wide Communications.

As to the first shipment, Horizon contends that World Wide agreed to pay the freight charges and that Nations Way knew of this agreement. As to the second shipment, Horizon contends that Nations Way and World Wide had a direct agreement that World Wide would pay the freight charges. Each shipment arrived with shipping documents indicating that the freight charges were to be collected from Horizon. Horizon accepted delivery on both occasions.

It is undisputed that under common law, the consignee (Horizon) is presumed liable for freight services in the absence of an express agreement to the contrary. *See Schneider Nat'l Carriers, Inc. v. Rudolph Express Co., Inc.*, 855 F. Supp. 270, 273 (E.D. Wis. 1994). However, the presumption can be rebutted by evidence that the parties made other arrangements for the freight charges. *See id.*

After a trial to the court, the court found that bills of lading designated Horizon as the consignee of the goods shipped to Wisconsin and that World Wide denied responsibility for the freight charges for the two shipments. The bill of lading for the first shipment and the two delivery receipts indicated that freight charges were due on the shipments. The court found that there were no express contracts between Horizon and World Wide specifying that World Wide would pay the freight charges for the first shipment or between Horizon and Nations Way that World Wide would pay the freight charges for the second shipment. Based on these findings, the court concluded that the common law and provisions of the Interstate Commerce Act apply to the shipments and held Horizon, the consignee, liable for the freight charges.

We review the trial court's findings of fact to determine whether they are clearly erroneous. *See* § 805.17(2), STATS. The trier of fact is responsible for determining the weight of the evidence and the credibility of the witnesses. *See Micro-Managers, Inc. v. Gregory*, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988).

An account manager for Nations Way testified that the bills of lading, the controlling documents for the two shipments, indicated that Horizon was the consignee and that the terms of the shipments were collect. In the account manager's view this meant that Horizon was responsible for the freight charges. Nations Way did not have an agreement with anyone else to pay for the shipments to Horizon.

Horizon presented the testimony of Patrick Lowey, a representative of Fore Way Trucking, whom Horizon contacted to help arrange the first shipment. Lowey testified that the bill of lading governs the shipment and sets out who is responsible for payment of freight charges. Lowey was instructed by Horizon's president, William Stetter, that World Wide would bear the freight charges for the first shipment. Lowey told an unidentified representative of Nations Way that World Wide would pay the freight charges for the first shipment and made other arrangements for the first shipment which were consistent with his understanding that World Wide would pay the freight charges. However, there was no documentation of the alleged agreement between Horizon and World Wide regarding responsibility for freight charges. The bill of lading for the first shipment did not reflect the agreement to which Lowey testified.

Stetter, Horizon's president, testified that he contacted Lowey to make arrangements for the first shipment. Stetter's discussions with Lowey and World Wide indicated that World Wide would bear the freight charges for the first

shipment. Horizon would have refused delivery if it had realized that the shipment was collect to Horizon and Horizon was expected to bear the freight charges. Stetter believed that Nations Way and World Wide entered into an agreement relating to the freight charges for the second shipment.¹ However, Stetter did not have any documentation evidencing communications between Horizon and World Wide or between Nations Way and World Wide regarding freight charges. Stetter conceded that Horizon did not give written notice to Nations Way that World Wide was responsible for the freight charges on the two shipments.

In ruling from the bench, the trial court did not find credible Stetter's testimony that World Wide agreed to be responsible for any of the freight charges. The court cited the lack of documentation of the alleged agreements and the notations on the bills of lading and delivery receipts which indicated that Horizon received the shipments and was responsible for freight charges, consistent with the common law presumption. Essentially, the court concluded that in the absence of credible testimony that an entity other than Horizon would bear the freight charges and in the presence of documentation stating that Horizon would pay the freight charges, the presumption of consignee liability was not rebutted. The court was free to disregard testimony it found less credible. See *Micro-Managers*, 147 Wis.2d at 512, 434 N.W.2d at 102.

We conclude that the trial court's findings of fact are not clearly erroneous, and that the court applied the proper law to the facts it found. A consignee is presumed liable for freight charges when it takes delivery of the

¹ However, Stetter testified that a Nations Way representative who visited Horizon did not know how to reach the World Wide representative who allegedly entered into the freight charge agreement. This testimony undermined Stetter's contention that World Wide and Nations Way had been in contact regarding the second shipment.

property being shipped, unless it notified the shipper to the contrary in advance. *See Chicago & N.W. Transp. Co. v. Krohn Cartage Co.*, 79 Wis.2d 39, 43, 255 N.W.2d 310, 312 (1977). The trial court did not find any credible evidence that Horizon contacted Nations Way in advance regarding the freight charges. The presumption of consignee liability was not rebutted.

Horizon argues that the freight charges were unreasonable. The court found that the bills of lading and delivery receipts were evidence of the freight charges due Nations Way. The court also noted that the shipments occurred during a shippers' strike and that rates were affected by the strike. These facts are not clearly erroneous. Had Horizon found the freight charges objectionable, it could have refused to accept delivery of the newsprint.²

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

² To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See State v. Waste Management of Wis., Inc.*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

