

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0859

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

AM TRANSPORTATION, INC.,

PLAINTIFF-RESPONDENT,

v.

MATARAH INDUSTRIES, INC.,

DEFENDANT-APPELLANT,

ONESOURCE WORLDWIDE NETWORK, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Matarah Industries, Inc. appeals from a summary judgment granted in favor of AM Transportation, Inc. Matarah claims the trial court erred when it granted summary judgment because the contract between them failed to include the price, and because AM, acting as a contract carrier, was not covered by the rules applicable to common carriers. Because the trial court did not err when it granted summary judgment, we affirm.

BACKGROUND

¶2 Matarah solicited AM to transport seven loads of laundry disks to OneSource Worldwide Network, Inc. The cost for transporting the seven loads was discussed and agreed to by Matarah and AM. A bill of lading was prepared for each shipment. Matarah did not execute Section 7, the “nonrecourse” provision on the bills of lading. AM picked up each of the shipments at Matarah’s Milwaukee facility and delivered them to OneSource. The product was shipped “collect,” meaning that OneSource was supposed to pay the delivery charges. OneSource did not pay the delivery charges.

¶3 As a result, AM sued both Matarah and OneSource. Although a judgment was entered against OneSource, it was determined that this entity was judgment-proof. Proceedings continued against Matarah. AM filed a motion seeking summary judgment against Matarah. Matarah argued that the bills of lading relative to each of the seven shipments could not constitute a valid contract because the price term was not contained therein. Matarah also argued that AM could not rely on rules applicable to common carriers because this was a contract shipment. The trial court’s well-reasoned decision provides in pertinent part:

[T]he question here is whether there’s a genuine issue of material fact as to Matarah’s obligation on these bills. [Transportation companies] of course have to get paid for

their services. In this particular case, this was a shipping contract that AM actually arranged and paid for others to handle the product. Now [transportation companies] can either get paid from the sender [Matarah], the recipient [OneSource] or some other third party. In this case everyone intended ... that ... [payment would be made by the] recipient. But [transportation companies] have a special procedure to make sure they get paid just like other people engaged in business and want to make sure they're covered in case of something going wrong.

What the [transportation company] does is use the uniform bill of lading which requires the sender ... the party that's sending the [product] to make a choice ... in advance [as to what happens] ... if the recipient doesn't pay. Either you tell us now that you'll cover if the recipient doesn't pay or tell us to demand payment at the time of delivery.

If you tell us to demand payment at the time of delivery, we'll do that. We'll ship to Onesource and we'll stand there at the door, hold out our hand and get the cash first before we unload the truck. So the transportation company comes to the sending company and says which do you want us to do.

... What happened here is ... that the parties adopted standard business practices which utilize the standard bill of lading uniform bill of lading which incorporates all of this discussion ... and the sender is presumed to know based on experience, based on Federal law and based also on the precise explicit terms in fine print on the bill of lading that if you want the ... transportation company to refuse to drop the [product] absent payment to insist on payment before the [product] is unloaded from the truck, then you have to check off box number seven.

You have to sign box number seven which is an instruction to the [transportation company] to refuse delivery absent payment. Now, what would have happened if AM had gone to [OneSource and] asked for payment, Onesource said no please bill us and AM had refused to drop, well at that point AM could have been liable to Matarah for refusing to drop the [product] because Section seven wasn't checked, wasn't signed. So AM had to have it one way or the other from Matarah Matarah allowed the shipments and even directed the shipments to go through without getting payment on delivery and therefore, if all of the of the required details of a contract are set forth on the bill of lading, Matarah is indebted to AM for these services.

The trial court further ruled that the bills of lading were enforceable and binding even without the price term. The trial court concluded that the price could be determined from the information on the bills of lading, together with other standard documents.¹ Judgment was entered and Matarah now appeals.

DISCUSSION

¶4 When reviewing a grant of summary judgment, we apply the standards set forth in WIS. STAT. § 802.08, just as the trial court applies those standards. *Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). Under § 802.08(2), summary judgment must be entered, “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Our first step in the summary judgment methodology is to discern whether the pleadings set forth a claim for relief as well as a material issue of fact. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). If the pleadings meet this initial test, our inquiry shifts to the moving party’s affidavits or other proof to determine whether a *prima facie* case for summary judgment has been presented. *Id.* If the moving party has indeed made a *prima facie* case for summary judgment, we then examine the affidavits and other proof of the opposing party to discern whether there exists disputed material facts entitling the opposing party to a trial. *Id.*

¶5 The trial court correctly framed the issue: whether there is any material issue of fact as to Matarah’s obligation to pay AM’s transportation bills.

¹ The trial court did find that one of the seven shipments did not contain the necessary information from which price could be determined. As a result, summary judgment was not granted on that contract. Neither party appealed from that ruling.

Matarah contends that there are disputed issues both in regard to whether the bills of lading are enforceable without a price term, and whether AM may benefit from rules applicable to common carriers, despite the fact that it operated as a contract carrier in this case. We agree with the trial court that there is no genuine dispute on either and, therefore, we affirm.

A. *Price.*

¶6 Matarah first contends that the bills of lading do not constitute an enforceable contract because the price is not contained on the face of the document. We are not persuaded.

¶7 A bill of lading for any given shipment is the contract for carriage which governs that shipment. *Southern Pac. Transp. Co. v. Commercial Metals*, 456 U.S. 336, 342 (1982). To be enforceable, the contract must express the essential commitment and obligation of each party with reasonable certainty. *Witt v. Realist, Inc.*, 18 Wis. 2d 282, 297, 118 N.W.2d 85 (1962). There must be a meeting of the minds between the parties as to the essential terms. *Todorovich v. Kinnickinnic Mut. Loan & Bldg. Ass'n*, 238 Wis. 39, 42, 298 N.W.2d 226 (1941). With respect to the price term, the contract must specify an amount, or provide a manner by which the price is to be ascertained or determined. *Machesky v. City of Milwaukee*, 214 Wis. 411, 412, 253 N.W. 169 (1934).

¶8 It is undisputed here that Matarah and AM agreed upon a price prior to the shipments being made, that the bills of lading were prepared in accordance with the agreement, and that the bills of lading were signed by a Matarah representative. Further, the bills of lading provided the information necessary to ascertain or determine the price. Therefore, the absence of the specific price term on the bills of lading did not render the contracts unenforceable.

¶9 Moreover, the federal statutes do not require that the price term for transportation charges be included on the bills of lading. 49 C.F.R. § 373.101. This statute requires a bill of lading for motor carriage in interstate commerce to contain: (1) the names of consignor and consignee; (2) the origin and destination points; (3) the number of packages; (4) the description of the freight; and (5) the weight, volume or measurement of the freight. *Id.* The documents at issue in this appeal contain the necessary information, and therefore comply with the federal statute.

B. Common v. Contract Carrier.

¶10 Matarah next contends that because AM was a contract carrier, rather than a common carrier, it was not entitled to utilize the rules applicable to common carriers. Specifically, Matarah asserts that AM cannot claim that Matarah's failure to execute the nonrecourse provision on the bills of lading results in Matarah's liability because that rule applies only to common carriers. We are not persuaded.

¶11 It is undisputed that both parties utilized the bills of lading for each shipment, and that Matarah did not execute the nonrecourse provisions on the bills of lading. Thus, regardless of whether AM was operating as a common or contract carrier, the terms applicable to the bills of lading and its terms were incorporated into the agreement. Both parties agreed to the terms contained in the bills of lading and thus, must be bound by them. The fact that AM was operating as a contract carrier did not preclude the application of common carrier rules when both parties agreed to utilize those rules. Matarah's argument that common carrier rules can never apply to a contract carrier is not persuasive. The parties here agreed to be bound by certain rules, which are standard among common carriers,

despite the fact that this shipment was a contractual one. Therefore, Matarah's failure to execute the nonrecourse provision on the bills of lading made it liable to AM for the transportation costs that OneSource failed to pay. *Southern Pac. Transp. Co.*, 456 U.S. at 343.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

