

DATE: May 25, 2000

In Re:

Resource Protection

on behalf of

Associated Storage and Van, Inc.

Claimant

Claims Case No. 00050804

CLAIMS APPEALS BOARD DECISION

DIGEST

Tender of an item to a carrier is established as an element of a *prima facie* case of carrier liability where the item allegedly lost is reasonably related to items shown on the inventory, particularly where it would not have been unusual to pack the item in that container, and the carrier did the packing and prepared the inventory list. Accordingly, where a shipper claims, for example, that tapes and CDs were missing from an "entertainment center" in which they were normally maintained, there is sufficient evidence of tender for purposes of a *prima facie* case of liability against the carrier. In this instance the member's claim was supported by his statement in which he exhibited personal knowledge from packing day that the tapes and CDs were packed in the entertainment center.

DECISION

Resource Protection, on behalf of Associated Storage and Van, Inc. (Associated), appeals the March 15, 2000, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 00011812, which denied Associated's claim for a refund of \$1,020.34, that the Navy offset from Associated for loss of property from a service member's household goods shipment. [\(1\)](#)

Background

The record indicates that on May 15, 1998, Associated's agent picked up the member's shipment in Imperial Beach, California, and on July 2, 1998, another agent delivered the shipment to the service member in Janesville, Wisconsin. The Descriptive Inventory shows that Item 418 was an entertainment cabinet. On the *Notice of Loss or Damage* (DD Form 1840R), which the member dispatched on July 17, 1998, the member noted for Item 418, the "entertainment

cabinet" that: "music tapes and CDs inside-missing 213 tapes 8 CDs. . . " The member also noted that specific contents were irreplaceable.

On the *List of Property and Claims Analysis Chart* (DD Form 1844) the member noted that 216 music tapes and CDs were missing with a replacement cost of \$2,040.67. After applying 50 percent depreciation, the Navy determined Associated's liability at \$1,020.34. The member supported his claim with typewritten lists specifying each artist, album name, and the replacement cost (except for the non-replaceable albums). The member also provided a photograph of him and his family with the tapes/CDs displayed in the background. Finally the member provided a statement relating his attempt on packing day to retrieve albums from the entertainment center and that he abandoned this effort because the entertainment center was taped and banded shut. The member relates that the packer acknowledged that the tapes were in the entertainment center.

Resource Protection argues that there is no evidence that the member tendered the tapes and CDs to Associated's agent. Resource Protection contends that the agent that transports the shipment for the carrier owns equipment like bands and pads; the packer does not. Here, the packer did the packing on May 14, 1998, and on May 15th, the transporting agent arrived without knowledge of what the packers had packed on the previous day. If the member had observed bands on the entertainment center, then Resource Protection suggests that the member did not talk to the packer but to the transporter who was unaware of the contents of the entertainment center. On the other hand, Resource Protection suggests that if the member had talked to the packer, then he could not have observed his entertainment center with bands on it. Resource Protection contends that the entertainment center would have been too heavy if Associated had transported the tapes and CDs in the entertainment center, and in any event, the member is responsible for accuracy of the items described on the descriptive inventory.

Discussion

Tender of an item to the carrier is the first element in establishing a *prima facie* case of carrier liability for loss or damaged household goods; the shipper also must show that the item was not delivered (or was delivered in a more damaged condition) and the value of the item. See *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). In a tender dispute where an item is lost, we have inferred tender when the lost item bears a reasonable relationship to the items described on the inventory as the carton's contents. There is no need for an exact match between the description of the lost item and the contents of the carton. That is particularly true when it would not have been unusual to pack the item in the carton, and the carrier did the packing and prepared the inventory list. See DOHA Claims Case No. 96070226 (September 5, 1996); *American Van Services, Inc.*, B-249966, Mar. 4, 1993. In the present situation, we would not find it unusual that tapes and CDs would be shipped packed inside their normal place in an entertainment center.

The following are examples of comparable situations where either this Office or the Comptroller General inferred tender of articles within cartons even though the tendered article may not have strictly met the definition of words used by the carrier to describe the carton's contents: shoes/boots packed in a wardrobe carton in DOHA Claims Case No. 00050801 (May 17, 2000); tree lights with a Christmas tree in DOHA Claims Case No. 96070203 (September 5, 1996); a tool box with tools in *Ambassador Van Lines, Inc.*, B-256546 (September 23, 1994); pots, kitchen utensils, silverware, baking tins, an electric mixer and knives in cartons described as either "dishes," "pots," or "pans" in DOHA Claims Case No. 96111201 (March 13, 1997).

The member also supported tender with the photograph and his statement. The statement is specific, focusing on

packing day and his frustrated attempt to retrieve some of his tapes from the container normally containing them. The member observed that the entertainment center was taped and banded shut, and the packer acknowledged to him that the tapes were in the entertainment center. The member's statement reflects personal knowledge of the circumstances surrounding tender. This meets the standard for proving tender of objects not directly related to the description on the inventory. *See* DOHA Claims Case No. 96070220 (September 5, 1996).

Resource Protection tries to impeach the member's statement with compounded speculation. Resource Protection assumes that packing material such as banding is not available to packers but is supplied by transporters after the packers have departed. It assumes that transporters would necessarily be unaware of the contents of the containers packed by packers. However, one may also speculate that due to the working relationship between packer and transporter, banding material could have been made available on packing day. In any event, speculation is not evidence, and we will disregard it. *See American Van Services, Inc.*, B-249834, Feb. 11, 1993, *aff'd* B-249834.2, Sept. 3, 1993; *Stevens Transport*, 66 Comp. Gen. 670 (1987). Associated could have provided direct evidence by offering statements from the driver and packers, but failed to do so.

Finally, while the member cannot ignore the inventory, the Comptroller General has held that when the carrier packs and labels the household goods, the member is not precluded from showing tender merely due to the carrier's inventorying and labeling decisions. *See Cartwright Van Lines*, B-241850.2, Oct. 21, 1991.

Overall, we find that the Navy had a reasonable basis in this instance for finding that the member tendered the tapes and CDs to Associated.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: William S. Fields

William S. Fields

Member, Claims Appeals Board

Signed: Michael H. Leonard

Michael H. Leonard

Member, Claims Appeals Board

1. This matter refers to Personal Property Government Bill of Lading (PPGBL) ZP-151,947 and Navy Claim No. DB-99-039.