

KEYWORD: Transit Damage; non-temporary storage - rider

DIGEST: Where a service member places his household goods into non-temporary storage (NTS) and the delivering carrier fails to deliver an item and delivers others damaged, the delivering carrier cannot escape liability merely by producing a copy of a rider or exception sheet showing additional damages which was purportedly created between two prior NTS custodians but executed by only one of the two. The delivering carrier must follow the procedures in the *Tender of Service* for a rider or exception sheet to be recognized as evidence of the delivering carrier's non-culpability for the additional damages. **This decision was remanded by the DoD Deputy General Counsel (Fiscal) on December 21, 2001, for further consideration of the depreciation rate.**

CASENO: 00052218

DATE: 05/31/2000

DATE: May 31, 2000

This decision was remanded by the DoD Deputy General Counsel (Fiscal) on December 21, 2001, for further consideration of the depreciation rate.

In Re:

Andrews Van Lines, Inc.

Claimant

Claims Case No. 00052218

CLAIMS APPEALS BOARD DECISION

DIGEST

Where a service member places his household goods into non-temporary storage (NTS) and the delivering carrier fails to deliver an item and delivers others damaged, the delivering carrier cannot escape liability merely by producing a copy of a rider or exception sheet showing additional damages which was purportedly created between two prior NTS custodians but executed by only one of the two. The delivering carrier must follow the procedures in the *Tender of Service* for a rider or exception sheet to be recognized as evidence of the delivering carrier's non-culpability for the additional damages.

DECISION

Andrews Van Lines, Inc. (Andrews) appeals the March 14, 2000, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 00020712, in which Andrews seeks a refund of the Air Force's offset of \$971.74 for loss and damage to a service member's household goods.⁽¹⁾

Background

The record indicates that on July 18, 1994, Aztec Moving Systems obtained the shipment in Tucson, Arizona, and placed it into a non-temporary storage (NTS) facility in that city. On October 8, 1997, Andrews' agent, AB Moving & Storage, picked up the shipment from the NTS facility, and on October 21, 1997, another Andrews agent delivered it to the service member in Louisiana. On the Descriptive Inventory, Items 96-105 were listed as parts of a Schrank, and Item 111 was listed as a rocking chair. On the *Joint Statement of Loss or Damage at Delivery* (DD Form 1840) and the *Notice of Loss or Damage* (DD Form 1840R) dispatched on October 29, 1997, the member reported damage to various parts of the Schrank. On the DD Form 1840R, the member notified Andrews that Item 111 was missing. Andrews' refund request is based on the offset of \$478.35 for two parts of the Schrank, plus \$493.39 for the replacement of the rocking chair.⁽²⁾ The record also shows that the service member signed the Descriptive Inventory on July 18, 1994, which was included within the *Non-Negotiable Warehouse Receipt and Contract*.

In this appeal, Andrews contends that it presented a rider (a statement of exceptions to acceptance) which exonerates it of all liability for the rocker and Schrank parts. Andrews states that the rider was created when Aztec transferred custody of the NTS to Moving Services, Inc. The copy of the three page "Rider to Inventory" shows, among other things, the shipper's name (the member), his service number, the origin as "Aztec Moving & Storage" with a Tucson address, and a destination as MVIS (Moving Services, Inc.) with a different Tucson address. Various types of damage were noted with respect to Items 96 through 105. The copy of the rider also includes an entry for Item 111 which states: "Rocking Chair - did not check off - Received Brown OS Rocker . . .," and it is followed by more than a line and a half of specifically identified damages. The rider appears to be signed by a representative from MVIS, but it is not signed by a representative from the party making the delivery to MVIS. Andrews argues that this is evidence of damage prior to its receipt of the shipment, and that the "did not check off" language means that the rocker never arrived at some point prior to Andrews' custody. The record does not include a rider in which Andrews' agent participated nor an inventory created by Andrews. No statement is provided from Andrews' driver.

Discussion

Generally, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his *prima facie* case when he shows delivery in good condition, failure to deliver or arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. *See Missouri Pacific Railroad Company v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). Once the shipper has established a *prima facie* case of liability, the burden is on the carrier or other bailee to show either that the damage did not occur while in its custody, or that the damage occurred as a result of one of a number of causes for which the carrier is not liable. Additionally, when goods pass through the custody of several bailees, it is a presumption of the common law that the damage occurred in the hands of the last one. *See Stevens Transportation Co., Inc.*, B-243750, Aug. 28, 1991; and *McNamara-Lunz Vans and Warehouses, Inc.*, 57 Comp. Gen. 415, 418 (1978).

The last custodian can avoid liability by showing that the damage or loss did not occur while the item was in its custody. For a carrier removing goods from a storage facility for delivery, that showing is made by preparing an exception sheet--a rider--to the inventory; the rider then can serve to rebut the general common law presumption of the last carrier's liability. *See DOHA Claims Case No. 96070210* (September 19, 1996) citing *Able Forwarders, Inc.*, B-252817, Apr. 19, 1993; and *A-1 Ace Moving and Storage, Inc.*, B-243477, June 6, 1991. Item 55m of the *Tender of Service*⁽³⁾ describes a proper rider. It requires, among other things, that the carrier, in conjunction with the storage contractor, check each item of the storage lot in accordance with the NTS inventory. If there is a difference in the condition of the item from that

found on the inventory, the carrier must prepare an exception sheet or rider with the differing conditions noted. When the opinions of the carrier's and the warehouse's representatives differ, both opinions are to be reflected on the carrier's exception sheet. Both the carrier's and warehouse's representatives must sign the exception sheet. Item 55n of the *Tender of Service* requires at least a cross reference to the item numbers used on the NTS inventory, and item 55o requires the use of the same inventory prepared at origin to verify delivery at destination.

When Andrews' agent arrived at MVIS in 1997 to obtain the shipment, it could have exercised either of two procedures to properly protect Andrews' interests. It could have looked at the NTS inventory (the one signed by the member when he transferred custody to the NTS facility), and in conjunction with MVIS representatives, Andrews' agent could have noted any differences with the NTS inventory on a rider or exception sheet of its own creation. Or, Andrews' agent could have created a new inventory and noted any differences as to the NTS inventory on an exception sheet or rider. Both MVIS and Andrews' agent were required to sign any exception sheet or rider. Instead, Andrews' agent chose not to create a rider or separate inventory, but Andrews offers, as authentic and probative, a rider (without an entire inventory) purportedly signed by MVIS without the signature of the representative of the party who transferred custody to MVIS. The *Tender of Service* clearly indicates that a unilateral rider (*e.g.*, one created and signed by Andrews without an MVIS signature) would have been unacceptable to relieve Andrews of liability. *Id.* A unilateral rider between MVIS and a prior unidentified custodian would be even less authentic and probative.

The absence of a check mark is equally speculative. There is no explanation concerning the purpose of the check marks by the person who did so and why the rocker was not checked. Paradoxically, the copy of the rider that Andrews offered states that the rocker was not checked; then it indicates that the rocker was received.

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: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading (PPGBL) ZP-204,913; Air Force Claim Barksdale AFB 98-324 and Andrews Claim 98-0144.
2. The Air Force indicates that it intends to offset an additional \$946.65 based on a total liability of \$1425 for damage to the Schrank.
3. The *Tender of Service Personal Property Household Goods and Unaccompanied Baggage* (OMB 0702-0022) dated October 31, 1995, is set forth at Appendix A to the Department of Defense *Personal Property Traffic Management Regulation*, DoD4500.34-R (October 1991).