August 16, 2001

In Re:

OK Transfer & Storage, Inc.

Claimant

Claims Case No. 01041617

CLAIMS APPEALS BOARD DECISION

DIGEST

Under the "last handler" rule, and by operation of applicable regulatory and contractual provisions, the presumption of liability for damage to goods transfers from the carrier to the warehouseman upon conversion of the goods from storage-in-transit (SIT) to permanent storage. The three-pronged test outlined in *Fogarty Van Lines*, B-235558.7, Dec. 28, 1994, and adopted in our decision DOHA Claims Case No. 96081204 (April 8, 1997), is overruled.

DECISION

OK Transfer & Storage, Inc. (OK Transfer), appeals an offset by the Army Claims Service for goods found to be damaged upon removal from storage in the amount of $539.94.[(1)]

Background

OK Transfer picked up a shipment of household goods from Fort Riley, Kansas, on September 27, 1995, and transported it to Atlanta, Georgia. The shipment was placed into storage-in-transit (SIT) in Atlanta with Dixie-USA/A-1 Horton's, Inc. (Horton's) on October 10, 1995. SIT was originally authorized for a 90-day time period, however, it was extended for an additional 90 days by DD Form 1857 issued by Fort Riley. According to the agreement, SIT terminated on April 6, 1996, the 180th day of storage. At that point, SIT was converted into commercial storage at the owner's expense. OK Transfer billed the Army and was paid for the 180 days of SIT. All subsequent payments were made by the service member directly to Horton's. On June 2, 1998, over two years after the goods were placed in storage, the member accepted delivery of her household goods from Horton's.

After the member accepted delivery of the household goods, the Army submitted a claim for $529.07 to OK Transfer for goods that were either lost or damaged. The Army then collected $539.94 by offset from OK Transfer, which included $10.87 in interest. OK Transfer brings this appeal before us, arguing that liability for the goods transferred from it to the warehouseman upon termination of SIT; therefore, in accordance with the common law principle of liability of the last handler, the warehouseman was liable.

Our Office requested administrative reports from the Army Claims Service and the Military Traffic Management Command (MTMC). MTMC is the agency responsible for managing the Department of Defense's (DoD) Personal Property Program, and it has significant input in drafting contractual and regulatory documents such as the *Personal Property Traffic Management Regulation* (PPTMR), DoD 4500.34R, the *Tender of Service (*contained in appendix A to the PPTMR), and the *Domestic Personal Property Rate Solicitation* , discussed below. The administrative report submitted by the Army Claims Service admits that its field office committed error in assigning liability to OK Transfer in this case because Horton's was the last handler, and it states that it will refund the full amount of the offset, $539.94, to OK Transfer. MTMC's June 29, 2001, response also concludes that Horton's was the last handler in the particular case before us and further advises us that the Comptroller General's decision in *Fogarty Van Lines, Inc.* , B-235558.7, Dec. 28, 1994, and our subsequent decisions that adopted the *Fogarty* analysis, are inconsistent with Personal Property Program regulations.[(2)]

Discussion

A shipper establishes a *primafacie* case of liability against a carrier by establishing that it tendered the goods to the carrier in a certain condition; that the carrier delivered the goods in a more damaged condition or not at all; and the amount of damages. Thereafter, 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. *SeeMissouri Pacific Railroad Company v. Elmore & Stahl* , 377 U.S. 134, 138 (1964). Also, when goods pass through the custody of several handlers, it is a presumption of the common law that the loss or damage occurred in the hands of the last carrier or forwarder to act as the custodian of the goods. *SeeMcNamara-Lunz Vans and Warehouses, Inc.*, 57 Comp. Gen. 415, 417 (1978); DOHA Claims Case No. 96070205 (Sept. 5, 1996). This presumption is sometimes known as the "last handler" rule.

In the case before us, we agree with the conclusion that Horton's was the last handler and therefore OK Transfer should receive a full refund of the $539.94 offset. In this situation, the lawful period of SIT expired and custody of the goods passed permanently to the warehouseman under a separate contract. There was no evidence that damage had occurred while the shipment was in the custody of OK Transfer.

We note that past Comptroller General and DOHA decisions have held that a carrier may be liable for damage to goods not delivered to the member within the period authorized for SIT, even though SIT had terminated in accordance with the contract between the carrier and the Department of Defense (DoD), where the carrier: (1) did not notify the government that the carrier was placing the shipment in permanent storage, as required by the GBL; (2) did not annotate the inventory upon change of custody, as required by the standard *Tender of Service;* and (3) billed the government for SIT, not permanent storage. *SeeFogarty Van Lines*, B-235558.7, Dec. 28, 1994; and DOHA Claims Case No. 96081204 (April 8, 1997). Upon further review of the plain meaning of relevant contractual and regulatory documentation, and on the advice of MTMC, we find that the three-pronged test outlined in *Fogarty* and adopted in our decision DOHA Claims Case No. 96081204, *supra,* should be overruled for the reasons explained below.

The first prong of *Fogarty* requires the carrier to notify the government that the carrier was placing the goods into permanent storage as set out in Block 25 of the GBL. Block 25 states, in part, that the carrier had to notify the Personnel Property Shipping Office (PPSO) prior to effecting delivery to the member's residence or placing into storage. While the type of storage is not further specified between SIT or permanent, as indicated below, this notification appears to relate to notification prior to SIT and does not appear to involve the conversion from SIT to permanent storage.

Although the *Fogarty* decision relies on Block 25 of the GBL to support the notice requirement, we agree that Block 25

of the GBL creates no additional notification requirements on the carrier at the time of conversion from SIT to permanent storage. Paragraph 11103z(4)(b) of the PPTMR, which provides instructions for completion of Block 25, only requires that notice to the government occur before delivery or placing into storage. It states:

Direct Delivery Not Requested . Enter "Before effecting delivery to residence or placing in storage, the carrier shall notify the PPSO specified in block 20."

This requirement is inapplicable where SIT expires and the goods are converted to storage at the member's expense, at the end of the SIT entitlement period. Therefore, we agree that the regulations as drafted do not currently require the carrier to notify the PPSO that the SIT at government expense has indeed been terminated.

oreover, the regulations set out in the PPTMR, do not specify such a requirement. The PPTMR does not create a duty on the part of the carrier to inform the PPSO that the period of SIT at government expense (generally 90 or 180 days) is terminated. The *Fogarty* decision drew this inference from Paragraph 6000b(4) of the PPTMR, which states:

(4) When SIT is extended beyond the first 90 days, the PPSO shall notify the carrier of the extension and the projected termination date. A copy of DD Form 1857, Temporary Commercial Storage at Government Expense (Figure 1-7), will be provided to the carrier for each extended 90 day period. When a shipment remains in storage beyond the SIT entitlement period, carrier liability shall terminate at midnight of the last day of the SIT period, the Government Bill of Lading character of the shipment shall cease and the warehouse shall become the final destination of the shipment. At this time, the warehouseman shall become the agent for the property owner and the shipment becomes subject to the rules, regulations, charges and liability of the warehouseman. Members should be advised of the requirement to procure their insurance during this period of storage.

The plain text of this paragraph indicates that the government, not the carrier, has the burden to notify the carrier of the projected date the SIT will terminate. The PPTMR creates no duty on the part of the carrier to contact the PPSO and inform them that the storage had been converted. MTMC notes similar language in Item 27 (Storage in Transit) of *Domestic Personal Property Rate Solicitation D-4*, effective November 1, 1995, an applicable contractual authority.

The second prong of *Fogarty* requires that the carrier annotate the inventory upon change of custody. The *Fogarty* decision asserts that the annotated inventory is required by the standard *Tender of Service*. After examining the *Tender of Service*, we agree with MTMC that it does not place any requirements on the carrier to annotate the inventory at the time custody of the goods in storage transfers to the warehouseman through the termination of SIT. Absent a contractual agreement to prepare an inventory at the time of termination of SIT, carriers can not be required to prepare such an inventory.

Finally, the *Fogarty* decision requires that the carrier bill the government for SIT, not permanent storage.[(3)] MTMC suggests that a carrier's billing by itself does not make the carrier otherwise liable for damage presumed to have occurred beyond the authorized SIT period.[(4)] Paragraph 6000b(4) of the PPTMR and Item 27 (Storage in Transit) of *Domestic Personal Property Rate Solicitation D-4*, make it very clear, in the absence of specific proof of loss during SIT, that carrier liability terminates at midnight of the last day of the SIT period, the Government Bill of Lading character of the shipment shall cease and the warehouse shall become the final destination of the shipment.

Our decision here is limited to cases involving common carrier liability and the conversion of storage from SIT to permanent storage, and not to situations, for example, where the GBL carrier fails to comply with paragraph 54m of the

Tender of Service when preparing an inventory on shipments released from non-temporary storage.

Conclusion

We affirm the Army's Claims Services decision to refund the offset to the carrier.

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Michael D. Hipple

Chairman, Claims Appeals Board

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Jean E. Smallin

Member, Claims Appeals Board

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Jennifer I. Campbell

Member, Claims Appeals Board

1. This matter refers to Personal Property Government Bill of Lading (PPGBL)

VP-791,347; and Army Claim 98-271-0410. For administrative purposes, the Board is responding to this appeal.

2. Normally, in instances where the Army Claims Service or other agency agrees with the carrier's claim, we close our files without action. In view of the conflict with precedent, we believe it would be inappropriate to follow such a procedure here without comment.

3. In the *Fogarty* decision, the Comptroller General noted that the agent had previously billed at higher SIT rates, and received payment on behalf of itself and Fogarty, for the entire storage period (666 days). Fogarty objected only after the government asserted common carrier liability against Fogarty for the entire period. Likewise in DOHA Claims Case No. 96081204, *supra,* the carrier was paid SIT until the shipment was delivered to the member at a point in time after the authorized SIT had expired.

4. There is some support for the proposition. For billing purposes, a transportation transaction is reviewed as it was intended to be, and not how the parties billed. Under 31 U.S.C. § 3726, the Administrator of General Services audits

transportation charges, such as SIT. In a situation like the one in *Fogarty*, the Administrator is responsible for recasting the transaction as it should have been, and determining the correct billing that follows from such a reconstruction. The difference between the charges for the authorized SIT period and the 666 days of SIT actually billed in the *Fogarty* case would have been collected as an overcharge.