

DATE: September 21, 2000

In Re:

National Claims Services, Inc.

on behalf of

Best Forwarders, Inc.

Claimant

Claims Case No. 00091204

CLAIMS APPEALS BOARD DECISION

DIGEST

When an item is not listed on the inventory, the member must present at least some substantive evidence of his tender of the item to the carrier beyond his claim and the acknowledgment on it of the penalties for filing a false claim. Such evidence may be a statement reflecting personal knowledge of the circumstances surrounding the tender of the items to the carrier or other substantive evidence to support the tender. This requirement is met when the member explains that the missing audio CDs, cook books and recipe cards were packed into a carton described as "shoes" after he had moved these articles into a closet with the shoes just prior to tendering his household goods so that they would be readily accessible at delivery. The member also indicates he observed the packing at origin.

DECISION

National Claims Services, Inc. (NCS), on behalf of Best Forwarders, Inc. (Best) appeals the August 24, 2000, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 00080809, in which DOHA disallowed NCS' claim for a refund of \$633.50 that was offset by the Navy for transit loss in a service member's household goods. [\(1\)](#)

Background

The record shows that Best's agent picked up the shipment in Yorktown, Virginia, on July 30, 1998, and another agent delivered it to the member in Maryland on October 1, 1998. Descriptive Inventory Item No. 65 was a carrier-packed, 3 cubic foot carton described by the carrier as "Shoes." At delivery, the member and agent reported no missing or damaged items, but on November 20, 1998, the member and the Navy dispatched a *Notice of Loss or Damage* (DD Form 1840R) to Best describing the loss of 38-48 CD albums (specifying some examples), a cookbook, a card file of

recipes and a cookie cook book. The member supported his claim with a written statement.

In the statement, the member indicated that he and his family placed these articles in a closet with the shoes because they wanted to easily access them at destination. The member stated that these articles were observed being packed into the carton with the shoes, and the carton was sealed prior to departure from origin. However, at destination, the member apparently observed that the carton had been opened prior to his examination of it, and that when he did examine it he found that the "top 1/3 of the box was empty - missing the CDs, CD crate and cookbooks." The member elaborated that on arrival, the carton's open condition "with missing contents" was marked on the inventory sheet. The member's signature does not appear on the statement, but it is hand-written with his name, address, and telephone number.

NCS contends that the burden of proving tender is with the member, and there is no substantive evidence to support the member's claim that he tendered these articles to Best. Throughout the adjudicatory process, NCS has argued that shoes are completely unrelated to CDs, recipe cards and cookbooks. NCS points out that its copy of the delivery inventory did not note the open condition of the carton, and that the loss and condition was not reported at delivery on the *Joint Statement of Loss or Damage at Delivery* (DD Form 1840). Moreover, the member did not sign his statement. In this appeal, NCS also notes that "it is the service member's burden (not the carrier's) to establish that an item was tendered to the carrier and common law does not allow a self-serving statement by itself to establish tender."

Discussion

We agree with NCS, as does the Navy, that the burden of establishing tender is with the member. 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). *See also* DOHA Claims Case No. 00050804 (May 25, 2000); and DOHA Claims Case No. 00050801 (May 17, 2000). But, not every household good has to be listed on the inventory, and a carrier can be charged with the loss where other circumstances are sufficient to establish that the goods were shipped and lost. *See Aalmode Transportation Corp.*, B-240350, Dec. 18, 1990. In some cases, tender may be inferred when the lost article bears a reasonable relationship to the items described on the inventory as the carton's contents, particularly where it would not have been unusual to pack the article in the carton and the carrier did the packing and prepared the inventory. *See* DOHA Claims Case No. 00050804, *supra*; and DOHA Claims Case No. 00050801, *supra*. In the current claim, the identified "shoes" were unrelated to the missing articles, and in the absence of the member's written statement or other proof, the Navy could not have reasonably concluded that the member tendered these articles to the carrier.

The member's claim of tender is not defeated merely because the lost article is nominally unrelated to the item described on the inventory. A second line of decisions by our Office and the Comptroller General holds that when an item is not listed on the inventory, the shipper must present at least some substantive evidence of his tender of the item to the carrier beyond his claim and the acknowledgment of the penalties for filing a false claim. The member must provide a statement reflecting personal knowledge of the circumstances surrounding the tender of the items to the carrier or other substantive evidence to support the tender. *See* DOHA Claims Case No. 98072215 (August 24, 1998); DOHA Claims Case No. 96070220 (September 5, 1996); *Allied Freight Forwarding, Inc.*, B-260695, Sept. 29, 1995; and *American VanPac Carriers*, B-256688, Sept. 2, 1994. In this case, the member supported his claim with a hand-written statement describing the circumstances of the tender,⁽²⁾ and the statement contained at least as much detail as the member statements in the Comptroller General and DOHA Claims Appeals Board decisions cited above. This is corroborated by the fact that the member shipped stereo equipment, and Best had not identified any other item as containing CDs. Accordingly, we believe that the Navy's claims officer acted reasonably in accepting the member's statement.

There is no basis for NCS' appellate argument that the member's statement is unallowable because the "common law" does not allow an uncorroborated, self-serving statement to establish tender. While NCS invoked the "common law," it failed to cite any legal authority supporting this proposition. Some modern examples of courts or administrative bodies receiving uncorroborated testimony into evidence include receipt of such testimony for criminal sentencing purposes (*Terry v. United States*, 916 F. 2d 157, 160-161 (4 Cir. 1990)), as well as immigration judges in asylum applications (*Mejia-Paiz v. Immigration and Naturalization Service*, 111 F. 3d 720, 722 n.1 (9 Cir. 1997)). Also, the mere claim that evidence is self-serving does not mean that the trier of fact cannot consider it. *Compare, for example, Rushing v. Kansas City Southern Ry. Co.*, 185 F.3d 496, 513 (5 Cir. 1999) and *Winchester Packaging, Inc. v. Mobil Chemical Co.*, 14 F.3d 316, 319 (7 Cir. 1994). In the absence of other considerations (*e.g.*, a governing statute or regulation), uncorroborated, self-serving statements are considered if relevant, but the trier of fact will exercise reasonable discretion in determining the weight that applies to them. In some past claims where a trier of fact reasonably would expect better corroboration of tender in light of the nature of the article, little or no corroboration led to a finding that evidence of tender was insufficient. *Compare, for example*, DOHA Claims Case No. 99080603 (September 10, 1999) and *O K Transfer & Storage, Inc.*, B-261577, Mar. 20, 1996.

Conclusion

We affirm the Settlement Certificate.

See Dissenting Opinion

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

Dissenting Opinion

I concur with my colleagues comments in this matter except for the effect of the portion of the member's written statement clearly indicating that when Item 65 arrived, it was opened; it had missing contents; and it was reported as such on the inventory. None of the inventory sheets indicates this, and as NCS points out, there was no DD Form 1840 noting missing contents. In my view, this portion of the member's statement was material, and the inconsistency between the written statement and the lack of a corroborating notation on the inventory is so significant that it impeaches the reliability of the entire statement. Accordingly, I would find that there is insufficient evidence of tender and would refund \$633.50 to Best.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading (PPGBL) ZP-338,826; Navy Claim No. 469; carrier reference 03-0524-98; and NCS file E-567.

2. We note that in addition to stating that he saw the CDs, CD crate, and cookbooks being packed in Item 65, why these items were packed together, and that Item 65 was open at delivery with these particular items missing, the member also stated: "When box #65 left, it was sealed, when it arrived it was already opened, as marked on the inventory sheet upon arrival, with missing contents." In our view the member's exact meaning of that particular sentence is not entirely clear. If we presume, as NCS argues, that the member is saying he annotated the inventory at delivery, we note that the record does not contain a copy of the inventory with such a notation. However, we find that this sentence is not material as regards the member's statement of his personal knowledge of the circumstances surrounding tender and his stating a *prima facie* case -- he described how and where these items were packed and the fact the box was delivered opened and partially empty. Whether he recognized that the box was opened or closed when it was delivered or whether he noted its condition in writing on the delivery date is not relevant to the issue of tender.