DATE: June 28, 2001

In Re:

Stevens Worldwide Van Lines, Inc.

Claimant

Claims Case No. 01042706

CLAIMS APPEALS BOARD DECISION

DIGEST

Absent clear proof by the carrier that transit damage did not occur while the goods were in its custody, a delivering carrier is presumed to be liable for damage as the "last handler" of the goods prepacked by the NTS contractor if the shipper otherwise presents sufficient evidence to establish a *prima facie* case of liability, even though the carrier is not under a general obligation to open such prepacked containers that are in apparent good order.

DECISION

Stevens Worldwide Van Lines, Inc. (Stevens) appeals the June 30, 1998, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 98040105, disallowing Stevens claim for a refund of $896 that the Army had offset in April 1996, for transit damage to the household goods of a service member.

Background

The record shows that a non-temporary storage (NTS) contractor packed and picked up the shipment in Warrenton, Virginia, on February 14, 1991, and then placed it into its warehouse in Manassas, Virginia. On May 10, 1994, Stevens

picked up the shipment from the NTS warehouse and on May 11, 1994, it delivered the shipment to the member in Severn, Maryland. Stevens did not prepare an exception sheet or rider. The member and Stevens' agent did not note any damage at delivery, but on June 10, 1994, the member dispatched *Notice of Loss or Damage*, DD Form 1840R, advising Stevens of dry-rot damage to Descriptive Inventory Item Nos. 93 (a carrier packed picture) and 97(a carrier packed picture frame), two mirror cartons containing paintings and an artist's portfolio. In the description of the damage, the member noted that he observed a green-colored mold on both cartons. In the *List of Property and Claims Analysis Chart*, DD Form 1844, the member further indicated that the green dry-rot was all over the bottom of the boxes. The record indicates that Stevens did not inspect the shipment after dispatch of the DD Form 1840R.

Stevens interprets the member's observations concerning the containers to refer only to the inside of the bottom of the boxes, not the outsides. It alleges that there was no external damage to either carton that would have prompted its agent to open and inspect the contents inside. It notes that the damages, dry-rot and green-rot, are not damages that would have occurred over the single day that the carrier had possession. Under the circumstances, it contends that there is no *prima facie* case of liability against it. It believes that the damages are more likely to have occurred between delivery and the dispatch of the DD Form 1840R, and it is possible that the water damage was caused by "humidity changes and atmospheric conditions" during NTS. Finally, Stevens notes that Item 97 was described as a "picture frame," and there is no evidence of tender of an artist's portfolio or paintings.

In the appeal, Stevens essentially reaffirms the points it made above, but it enlarges its defense to advance the theory that notwithstanding any possible liability as the last custodian of the household goods, it would be relieved of liability because it was free from any negligence and an inherent vice caused the damage. It provides references to prove that there was no rain in the aryland-Virginia area during the period May 10-11, 1994, and it argues that the shipment itself inherently contained enough moisture from other items (i.e., outdoor type items plus a washer and dryer) that were in close enough proximity over the three years of storage to stimulate the growth of fungi producing "dry rot" when favorable conditions became present. It also references a tracer letter from the NTS contractor indicating that the shipment was not exposed to water while in the warehouse.

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). In addition, 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 McNamara-Lunz Vans and Warehouses, Inc.*, 57 Comp. Gen. 415, 418 (1978); and DOHA Claims Case No. 96070205 (September 5, 1996).

In reviewing the Army's adjudication and DOHA's Settlement Certificate, we first find that the record contains a sufficient basis for the Army to have reasonably concluded that Item 97 was tendered with paintings and an artist's portfolio. These articles were delivered damaged and were available for Stevens' inspection. When an item is delivered in a damaged condition and the damage is noted on the DD Form 1840R, the fact that the carrier delivered the item establishes that the shipper owned and tendered it. *See* DOHA Claims Case No. 96080215 (March 6, 1997); and DOHA

Claims Case No. 96070220 (September 5, 1996). This finding is also supported by the fact that the portfolio and the paintings are reasonably related to the frames used to enclose the paintings and to the wardrobe carton. The Army's administrative report states that the portfolio could be mistaken for a type of picture frame. *See* DOHA Claims Case No. 97102410 (December 23, 1997).

Stevens emphasizes that there was no apparent damage to the outside of the cartons; therefore, it had no basis to open and inspect them. Even so, Stevens still cannot prevail. In an earlier claim presented by Stevens, we rejected the company's argument that it can avoid liability under the "last handler" rule with respect to those containers that are in apparent good order and regarding which it was not obliged to open and re-pack. *See* DOHA Claims Case No. 96070231 (February 10, 1997). Absent clear proof by the carrier that transit damage did not occur while the goods were in its custody, a delivering carrier is presumed to be liable for damage as the "last handler" of the goods prepacked by the NTS contractor if the shipper otherwise presents sufficient evidence to establish a *prima facie* case of liability, even though the carrier is not under a general obligation to open such prepacked containers that are in apparent good order. *See* DOHA Claims Case No. 98043010 (May 18, 1998); and DOHA Claims Case No. 96070205, *supra*, citing *McNamara-Lunz Vans and Warehouses, Inc.*, *supra*, and other Comptroller General and judicial decisions noted therein. The best way for the carrier to establish that damage did not occur in its custody is to inspect the goods and create an exception sheet or rider explaining the differences between the NTS contractor's inventory and its inventory. *See* DOHA Claims Case No. 96080202 (November 21, 1996).

In *Towne International Forwarding, Inc.*, B-260768, Dec. 28, 1995, the Comptroller General found that a carrier that had custody of a shipment for only 11 days but that had failed to unroll a carpet, inspect it and state an exception to its condition at pick up from an NTS facility after more than three years of storage, still may be held liable for mildew and dry rot damage to the carpet under the last handler theory. The Comptroller General stated that without a rider on the carpet at pick up, the carrier did not meet its burden of proving that the damages occurred during storage, and not during transit, when the carrier's remaining evidence consisted only of: an appraiser's opinion (stated several months after delivery) that the carpet had become wet during NTS; the comparative amount of time that a carrier had custody of the carpet (11 days) versus the amount of time in NTS (over three years); and water damage to another box in the shipment as noted in the rider. We believe that the current claim is indistinguishable. While Stevens had custody for only one day, we note that no other moisture, mildew or "dry rot" damage was reported, and Stevens' appeal suggests that there is no evidence to indicate that the NTS facility was exposed to moisture during NTS .

It is inappropriate for us to consider Stevens' new defense against liability at this point in the appeal process. *See generally* DOHA Claims Case No. 97122314 (February 23, 1998). Stevens should have raised any purported inherent vice issue for the Army's consideration before the Army Claims Service adjudicated the company's liability. The Army is deemed to have the subject matter expertise to properly evaluate the factual likelihood that any inherent vice actually existed. However, from a purely legal perspective, we believe that Stevens may have had difficulty establishing its position. As we view Stevens' submission, it contends that air naturally contains spores that could give rise to the destructive fungus if moisture sources are present from other items in the shipment when they are held together in close proximity for long periods of time. However, Stevens still had to present clear and convincing evidence that such a process did happen here. Additionally, to establish proximate cause, a reasonable fact finder would want to know the exact location of the offending (moisture bearing) items; how well they were enclosed in their own containers; atmospheric conditions inside the warehouse for the three years; and an explanation for the absence of similar damage in other items. Furthermore, we are not convinced that the condition described by Stevens is an "inherent vice." An inherent vice does not relate to an extraneous cause but to a loss entirely from internal decomposition or some quality in the property which brings about its own injury or destruction. *See Chandler Trailer Convoy, Inc.*, 56 Comp. Gen. 357 (1977) and decisions cited therein. In effect, Stevens complains that the articles in Items 93 and 97 were contaminated, in part, by moisture from other parts of the shipment.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

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Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board