

KEYWORD: Transit Damage

DIGEST: When a carrier fails to inspect the damage or investigate/adjudicate the claim within the period provided in the *Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules* , a shipper presents *prima facie* evidence of transit damages to several items when the shipper claims that the items were damaged in transit; the items are delivered in a damaged condition (or more damaged condition) compared to their condition as noted in the inventory; and the damages are consistent with rough handling.

CASENO: 02052310

DATE: 06/27/2002

DATE: June 27, 2002

In Re:

Resource Protection

on behalf of

Covan World-Wide Movers, Inc.

Claimant

Claims Case No. 02052310

CLAIMS APPEALS BOARD DECISION

DIGEST

When a carrier fails to inspect the damage or investigate/adjudicate the claim within the period provided in the *Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules* , a shipper presents *prima facie* evidence of transit damages to several items when the shipper claims that the items were damaged in transit; the items are delivered in a damaged condition (or more damaged condition) compared to their condition as noted in the inventory; and the damages are consistent with rough handling.

DECISION

Resource Protection, on behalf of Covan World-Wide Movers, Inc. (Covan), appeals the May 13, 2002, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 02022805, wherein DOHA affirmed the Navy's offset of \$2,437.39 to recover transit loss and damage to the household goods shipment of a Navy employee, disallowing Covan's refund claim of \$1,419.50. [\(1\)](#)

Background

The record indicates that Covan obtained the employee's household goods in Jacksonville, Florida, on March 27, 1997, and delivered them to her in San Diego, California, on May 27, 1997, and on June 13, 1997. Four item numbers (5 articles) are in dispute in this appeal. [\(2\)](#)

In the Descriptive Inventory (inventory), Covan's representative noted the following pre-existing damage (PED) for Item 44, a surfboard: "torn, rubbed corner left, front and rear; scratched and rubbed top, side, left and bottom; and a burnt top." On the *Joint Statement of Loss or Damage at Delivery*, DD Form 1840, the member and carrier's representative noted that the surfboard was excessively chipped and scratched. The repairer's estimate accompanying the claim against Covan noted that the repairer planned to resurface the surfboard with epoxy due to chips and a large crack. The Navy's administrative report [\(3\)](#) found that the carrier had caused additional transit-related damage because the carrier's PED notation did not refer to chipping; the repair estimate did not mention anything about scratches; and the repair estimate did mention a large crack not noted as PED. The Settlement Certificate also noted that the inventory PED did not refer to any chipping; therefore, it found that the chipping was transit damage.

Resource Protection argues that the damage estimated for repair of the surfboard was pre-existing; therefore, Covan was not liable. It notes that the most severe damage was a large crack that was not reported on the DD Form 1840 or the DD Form 1840R. [\(4\)](#) Resurfacing would repair all of the PED noted on the inventory which was far more severe than damage alleged on the DD Form 1840/1840R.

In the inventory, Covan's representative noted that the sewing machine, Item 184, rattled at pick up. The DD Form 1840R, dispatched on August 20, 1997, noted that the arm did not operate. The standard electronics repair form noted that external parts were missing and broken. Resource Protection defends against liability on the basis that the repairer merely stated his opinion about how damage occurred, and that the member offered no statement as to the working condition of the sewing machine prior to transit. Resource Protection argues that the damage was internal damage, and that a carrier is not liable for damages that cannot be detected by ordinary observation.

The inventory noted no PED for Item 192, a 3.5 cubic foot carton containing a Kenwood receiver and a agnavox VCR. The DD Form 1840R noted that both were inoperable. With respect to the question in the standard electronics repair form asking whether there is evidence of external damage, the VCR repairer noted that there was external damage, and a separate repairer for the receiver failed to respond to this question. The Navy concluded that since both pieces of equipment were shipped together and there was evidence of external damage on one item, damage to both was transit related. Resource Protection defends Covan on the same basis as Item 184.

Finally, with respect to Item 196, a Gateway 2000 computer, no PED was noted on the inventory. On the DD Form 1840R, the member reported that the computer was inoperable. In the standard electronics repair form, the repairer noted that there was external damage. He also noted that various cables were loose and an internal support bracket was cracked. The record indicates that the computer contained an Intel 486 DX processor and was purchased by the member in February 1996. Resource Protection contends that the computer was actually manufactured in 1994, and for a computer of this age, the only way that damage could occur was if the member had failed to perform a required "lock down" prior to tender.

The Settlement Certificate noted that Covan failed to inspect when advised of the damages, and failed to raise the above defenses within the 120-day window available to it to adjudicate the subrogated claim. (5) Covan offered no alternative repair estimate(s). Resource Protection admits that Covan did not respond within 120 days of the dispatch of the subrogated claim, but it says that Covan appealed prior to offset. The Navy states that Covan did not respond to the Navy's final demand, and that there was no response until Resource Protection's letter of February 1, 2001 (more than 10 months after set off).

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 tender in good condition, failure to deliver or arrival in a damaged or more 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). Since neither Covan nor its agents inspected the damaged goods, nor did Covan investigate the claim and respond within 120 days of the demand, we will focus on whether the Navy's adjudication and findings are reasonable in light of the available record. *See DOHA Claims Case No. 98030603* (March 13, 1998).

Covan did document PED on the surfboard, but for the reasons noted above, the Navy reasonably concluded that the surfboard was delivered in a more damaged condition. Our decisions and those of the Comptroller General note that even though some PED may be repaired incidental to the repair of transit damage, this fact does not diminish a carrier's liability where the carrier has not demonstrated that the additional cost for doing so is ascertainable. *See DOHA Claims Case No. 96070212* (November 27, 1996); *American Van Services, Inc.*, B-256229, Sept. 8, 1994; and *Interstate Van Lines, Inc.*, B-197911.2, Sept. 9, 1988. Resource Protection argued that the large crack cannot be considered because the member did not note it on the DD Form 1840/1840R; however, this argument is erroneous because the purpose of the DD Form 1840/1840R is to provide the carrier sufficient notice of loss/damage so it may investigate. The Comptroller General and our Office have held that the member or employee is not required to precisely describe the nature of the damage on the DD Form 1840/1840R. *See DOHA Claims Case No. 97090818* (October 28, 1997) and the decisions cited therein.

Resource Protection properly pointed out that the employee failed to offer an explicit statement describing the working order of the sewing machine and other electronic equipment prior to the tender of these items. We agree that such statements are essential, and expect the military services to include these statements in the record. (6) Under the circumstances, the employee's claim that these articles were inoperable implies that they were in working order prior to tender. *See Senate Forwarding, Inc.*, B-256695, Dec. 8, 1994.

Despite Resource Protection's characterization of the damages to the sewing machine, VCR, and stereo receiver as internal damage, we accept the Navy's characterization that the damages were external. The repair estimate stated that external parts (in the arm) of the sewing machine were missing and broken, and the repair estimate for the VCR noted external damage. While no external damage was noted on the stereo receiver, it was packed in the same carton as the VCR with external damage. In determining whether internal damages are transit related, we have considered the proximity of the appliance to adjacent appliances exhibiting external damage and rough handling. *See* DOHA Claims Case No. 98060120 (June 16, 1998). When this proximity is the same container, there is substantial evidence from that fact alone that the appliance exhibiting only internal damage was also damaged in transit. The Navy also noted that the internal damage to the VCR was consistent with rough handling.⁽⁷⁾ Other than a rattle in the sewing machine, the carrier failed to note any PED at origin for these appliances.

Resource Protection offered no evidence to support its contention that the employee failed to perform "lock-down" procedures prior to moving the computer. Moreover, Resource Protection failed to offer any evidence concerning the nature of such "lock-down" procedures for the computer model involved. Our research in this area indicates that earlier versions of Microsoft's MS-DOS included a "park" command to properly secure hard drives prior to transport, but this command was no longer contained in MS-DOS version 6, the operating system available in 1994, or in Windows 95, which was available in 1996. Additionally, even if the employee executed a park command prior to tender, we do not see how this would have prevented damages to normally sturdy internal parts, *i.e.*, cables coming loose, the cracking of an internal support bracket, and the need to replace a motherboard. *Compare* DOHA Claims Case No. 00041902 (May 2, 2000).

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

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

1. This shipment involves Personal Property Government Bill of Lading YP-755,385; Navy Claim No. PCA 99-0927; and Covan file 01132199.
2. Our calculations indicate that the total amount of damage to the five articles at issue is \$1,184.50, not \$1,419.50 claimed by Resource Protection and Covan.
3. The Navy's administrative report was prepared by the Naval Legal Service Office Southwest in San Diego, California.
4. This is the reverse side of the DD Form 1840 (the *Notice of Loss or Damage*), a form used to report loss or damage as exceptions to delivery after the delivery date.
5. A carrier has a duty to investigate the loss and settle the claim within 120 days of the demand. See Paragraph IV(A) of the *Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules*.
6. Our review of the record indicates that the Naval Legal Service Office Southwest developed a "Content List for Loss or Damage to Personal Property," and it appears that the employee faithfully followed the requirements listed. Unfortunately, the list did not ask the member or employee to provide an explicit statement about the working order of each piece of equipment at origin prior to tender. The absence of these statements here is not an indication that the articles were not in working order, but merely an indication that the employee provided only the items requested.
7. The repairer noted that adjustments were required for all mechanical parts/guides for alignment and proper tape feed. Adjustments to posts and roller assembly were also required.