

DATE: August 12, 2003

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In Re:

American Van Services, Inc.

Claimant

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Claims Case No. 03080416

## CLAIMS APPEALS BOARD DECISION

### DIGEST

Where 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, and a carrier that obtains household goods from an unrelated non-temporary storage (NTS) facility without excepting to delivery with a rider or its own inventory will be held liable for all the goods listed on the inventory it accepted. A carrier cannot escape liability for an item on a NTS facility's inventory sheet merely by arguing that the item was in a different print than other items on the inventory.

### DECISION

American Van Services, Inc. (American) appeals the July 14, 2003, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 03061601, in which our Office affirmed the Navy's offset of \$1,218.38 for transit loss to the shipment of a service member's household goods, [\(U\)](#) disallowing American's refund request of \$701.28.

### Background

The record indicates that the shipper/member tendered a shipment to a non-temporary storage (NTS) facility (Worldwide Movers) in the state of Washington in December 2000. On July 2, 2001, American obtained the shipment from Worldwide and delivered it to American's agent at destination (Norco Moving & Storage) in Texas on July 13, 2001. The shipment was delivered to the shipper on September 7, 2001. The claimed transit losses involve the following items listed on a Descriptive Inventory sheet: a Mitsubishi VCR (Model HS-V48); a Pioneer tape deck (Model CT-40); an RCA Home Theater system (Model RY 9970A); RCA Speaker (Model SP 2099AN); and RCA speakers ("on 2" Model SP-9952). These contents were listed as a dish pack ("DP CTN") in the blocks for Items 105-109 and generally referenced as Item 105. At delivery, the shipper noted on the inventory sheet that Items 60 and 105 were missing, and in the DD Form 1840R (*Notice of Loss or Damage*), the member specified the missing contents of Item 105, except he

states that Pioneer speakers were lost instead of RCA speakers. In the DD Form 1844, *List of Property and Claims Analysis Chart*, the member indicates that all items were purchased in the period September through November 2000. <sup>(2)</sup>

During the adjudication of the claim with the Navy, American accepted the liability claimed (\$399.99) by the shipper for the Home Theater, but declined the claimed liability for the other items on various grounds.

Generally, with regard to the VCR and the tape deck, American declined claimed liability on the basis that the tendered items were last manufactured in 1993 and 1992 respectively, and that liability should be depreciated to 25 percent of replacement costs. In its appeal, American attaches copies of selective pages from the *Orion Video and Television Blue Book* (hereafter referenced as *Orion Blue Book*) as support. Some of the additional arguments presented by American in the record and on appeal are:

The shipper's credibility is doubtful because he alleges that he purchased all of the lost items within six months of pick-up by the NTS facility. Under these circumstances, and because American disputes the date of manufacture, it was reasonable for American to request copies of purchase receipts. The Navy acted unreasonably by not providing them;

The shipper's goods were transported in multiple shipments and that American was responsible only for the second of three shipments. The Navy should have questioned the member on whether he shipped the lost items in the other shipments, and should have provided copies of inventories from the other shipments to assist American in the investigation of the claim. In its appeal, American contends that the government cannot prove that it packed and inventoried the items listed on the Descriptive Inventory in issue, and that it handled only the household goods tendered by the NTS facility;

Item 105 appears on the inventory in an addendum below the words "end inventory," and on appeal American contends that Item 105 appears in a different ink than the remaining portion of the document. In its appeal, American contends that the Navy failed to explain how the inventory became altered before American received the shipment;

The government did not provide a satisfactory explanation showing how the replacement equipment is the equivalent of the lost equipment and did not explain why RCA speakers are reported in Item 105 while Pioneer speakers are reported on the DD Form 1840R;

The government did not offer a sufficient explanation in accordance with DOHA's "decisions 98012618, 98030604, 99081806, etc." <sup>(3)</sup> for not providing American the information and explanations described above, and contends that DOHA should be aware of the dates of these decisions even if American did not include that information in its claim.

The Navy's administrative report notes that the government bill of lading was issued by the Navy to American on November 20, 2000, and it was a Code 1 (door to door, non-crated) shipment for which American had responsibility from start to finish. The administrative report also notes that the VCR was manufactured in 2001 according to the *Orion Blue Book*.

## 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 B-243750*, Aug. 28, 1991; and *57 Comp. Gen.* 415, 418 (1978).

Assuming for purposes of this appeal that American was unrelated to the origin NTS facility, the relevant issue here is

whether American stated an exception to the receipt of Item 105 and the specific contents noted therein when it obtained the shipment on July 2, 2001. The issue is not whether the inventory was altered before American received the shipment or whether the addendum was written in by the shipper or the NTS facility's agent. 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. 00052218 (May 31, 2000); DOHA Claims Case No. 96070210 (September 19, 1996) citing

B-252817, Apr. 19, 1993; and B-243477, June 6, 1991. American did not except to the tender of Item 105. Therefore, the Board finds that Item 105 and the contents therein were delivered to American. The only issue here is the amount of damages.

Throughout the adjudication of the claim, American consistently argued that the VCR and the tape deck were last manufactured in 1993 and 1992 respectively. On appeal, American provides pages from the *Orion Blue Book* indicating that the VCR was manufactured in 1993, and the tape deck was manufactured in 1991 and 1992. As indicated above, the Navy disputes the date of manufacture based on the same *Orion Blue Book*, but the Navy did not provide documentary evidence.

It appears to us that neither the Navy nor American adequately addressed the issues involved in this matter. Generally, the burden is on the claimant, American in this case, to introduce clear and convincing evidence to prove the facts in dispute. *See* 57 Comp. Gen. at 419, *supra*. A carrier that relies on innuendo and alleged defects of the government's case, rather than introducing substantial evidence, is likely to fail to maintain its burden of proof. American's attempt here to introduce selective pages from the *Orion Blue Book* is minimal substantial evidence, but such evidence cannot be introduced for the first time on appeal. American should have provided this to the Navy in the adjudication of the claim. On the other hand, the Navy had a clear understanding of American's position on the VCR and tape deck, and once a specific, fact-based defense was raised by the carrier, the Navy should have addressed that defense specifically. In such circumstances, it is not sufficient merely to rely on the DD Form 1844. Overall, this record is devoid of documentary evidence supporting the amount of damages for the contents of Item 105 as articles that were on the retail market for the prices indicated in the DD Form 1844 within approximately 3 months of the time that the member tendered the articles for shipment in December 2000. The three DOHA Claims Cases cited by American are not applicable to the defects in the record on the damage issue involved here, but our remand will address American's concerns.

We remand this matter to the Navy to provide documentary evidence (from the *Orion Blue Book* or otherwise) for the record concerning: the manufacture dates of the models listed in Item 105; the fact that these models were on the retail market during the September through November 2000 period the member states he purchase them; the generally prevailing prices for these models at that time; an explanation why the replacements listed in Block 7 of the DD Form 1844 are comparable to the models listed in Item 105; and an explanation why the member reported a missing Pioneer speaker instead of the RCA speakers listed in Item 105. If the lost models listed in Item 105 were no longer on the retail market when the member states he purchased them, the record should explain the circumstances surrounding the purchase. If the Navy cannot provide this evidence to this Board within 60 days, this matter is settled in accordance with American's letter to the Navy of October 2, 2002.

### Conclusion

This matter is remanded to the Navy in accordance with this decision.

Signed: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

Signed: William S. Fields

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William S. Fields  
Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

1. This matter involved Personal Property Government Bill of Lading AP-900,630; Navy Claim No. 0300212; and carrier claim 0205599.
2. In Block 7 of the DD Form 1844, the member appears to list the replacements for the lost contents of Item 105 rather than the lost models listed on the inventory.
3. While not properly cited, we understand this to mean DOHA Claims Case No. 99081806 (September 14, 1999); and DOHA Claims Case No. 98012618 (February 12, 1998), *aff'd on reconsideration* in DOHA Claims Case No. 98030604 (June 19, 1998). These cases are available through DOHA's Worldwide Web site and are easily accessible to all parties.