DATE: April 27, 2004

In Re:

AAA Transfer & Storage

Claimant

Claims Case No. 04041601

CLAIMS APPEALS BOARD DECISION

DIGEST

In the absence of clear and convincing contrary evidence, on disputed questions of fact between the claimant and an administrative office, we accept the statement of fact furnished by the administrative office.

DECISION

AAA Transfer & Storage (AAA) appeals the January 30, 2004, Settlement Certificate of the Defense Office of Hearings and Appeals in DOHA Claim No.03121910, in which DOHA affirmed the Air Force's offset that included $82.50 for the cost of repair of transit damage to two items in a service member's household shipment.[(1)]

Background

The record indicates that the member tendered the shipment to the carrier on June 26, 2002, in Mississippi, and that the carrier delivered the shipment to the member on July 18, 2002, in Kentucky. While AAA's appeal is unclear in parts, we interpret AAA's position as the record contains insufficient evidence to demonstrate additional damage resulted to the two items during transit.

The Descriptive Inventory listed Item 239 as a multi-color wooden airplane rocker in a "soiled rubbed used" pre-existing condition (PED). The *Notice of Loss or Damage* (DD Form 1840R) dispatched on September 10, 2002, and the *List of Property and Claims Analysis Chart* (DD Form 1843) both described the condition at delivery as "numerous scratches and chips in wood/paint." The repairer offered to touch up the scratches for $50.

The Descriptive Inventory listed Item 242 as a large wooden rocker with the following PED: "left arm top marred

gouged, scratched right arm, top rubbed, front left legs marred." The DD Form 1840R and DD Form 1843 reported a "scratched arm." The repairer offered to touch up the scratches on an arm for $65, but the written estimate was not more specific concerning the location or nature of the damage. The Air Force was unsure which arm sustained new damage; therefore, it assessed AAA with 50 percent of the liability, or $32.50. The record is devoid of any written statement from the member, an inspector or other person (including a repairer offering an estimate) of a more specific description of the condition of the rocker at destination, but the Air Force interviewed the repairer concerning the basis of his estimate.[(2)]

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 issouri 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 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, under the *Military-Industry Memorandum of Understanding on Loss and Damage Rules*, effective January 1, 1992, when loss or damage is not reported at delivery, a notice of later discovered loss or damage (usually a DD Form 1840R) dispatched to the carrier not later than 75 days following delivery shall be accepted by the carrier as overcoming the presumption of the correctness of the delivery receipt. *See* DOHA Claims Case No. 02021303 (February 26, 2002).

If a carrier challenges an element of the *primafacie* case, such as the absence of damage caused during transit, it must offer clear and convincing contrary evidence or such evidence must be clear from the record. Here, the record reasonably supports the arrival of Item 239 in a more damaged condition than when tendered to the carrier. But with respect to Item 242 the evidence is more problematic.

Where the record shows PED and lacks evidence of greater or different damage after transit, the carrier is not liable for the damage. *See* DOHA Claims Case No. 97021808 (June 25, 1997) and the Comptroller General's decision in B-248535, Oct. 23, 1992. In the absence of the telephone interview, we would have concluded that the PED and the reported damage was indistinguishable, and the carrier would not have been liable. Although the evidence acquired during the telephone interview is minimal, it is still sufficient to establish a *primafacie* case of carrier liability. The carrier's characterization of the repairer's telephonic statement as "self-serving" goes to the weight, but not to the sufficiency of the evidence. In the absence of clear and convincing contrary evidence offered by the carrier, we defer to the administrative agency's findings of fact. *See* 57 Comp. Gen. 415, 419 (1978).

Conclusion

We affirm the Settlement Certificate for the reasons stated herein.

Signed: Michael D. Hipple

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ichael D. Hipple
Chairman, Claims Appeals Board

Signed: William S. Fields

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William S. Fields
ember, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin
ember, Claims Appeals Board

1. This shipment involves Personal Property Government Bill of Lading JP-065,015; and AF Claim No. Scott AFB 03-437.

2. As noted in the Air Force's administrative report, on February 27, 2003, an Air Force claims examiner spoke by telephone with the proprietor of the firm that offered the estimate to clarify whether the estimate included PED. The proprietor did not remember the particular shipment but stated that it was his practice to include only what he believes is transit damage. The Air Force documented the telephone interview with a written memorandum in the file.