

DATE: August 31, 2004

In Re:

American Van Services, Inc.

Claimant

Claims Case No. 04082451

CLAIMS APPEALS BOARD RECONSIDERATION DECISION

DIGEST

1. A carrier can be charged with loss even if items are not listed on the inventory, where other circumstances are sufficient to establish that the goods were tendered and lost.
2. If a claimant's request for reconsideration cites error in the appeal decision for not considering certain factors or explaining certain topics, the claimant must offer a rationale as to why and how a consideration of those factors or a discussion of those topics would result in a different outcome. Moreover, we cannot guess as to the basis for recovery; the theory of recovery must be reasonably clear.

DECISION

American Van Services, Inc. (American) requests a second reconsideration of the April 28, 2004, decision of this Board in DOHA Claim No. 04042701. [\(1\)](#)

Background

The essential issue in the case was whether the Army failed to present a *prima facie* case of carrier liability with respect to 109 DVDs claimed by the member. [\(2\)](#) In that regard, it was American's contention that there was no proof that the DVDs were tendered to American by the member or that American failed to deliver them. Because American had not demonstrated substantial error by the Army or DOHA, we reviewed the record for the sufficiency of the evidence to establish a *prima facie* case of liability against American.

Our examination of the record indicated that on September 11, 2002, at delivery, the member reported on the DD Form 619-1 "#71 Missing Piece unknown, Inventory Messed up." On the *Notice of Loss or Damage* (DD Form 1840R), dispatched on September 24, 2002, the member noted Item 71, name of item "unknown" with the following description of loss or damage: "Piece Missing Unknown Inventory is messed up." Descriptive Inventory Item 71 was listed by the carrier as a plastic storage bin, but the carrier did not describe the contents. On September 30, 2002, the member filed a claim against the Army for loss of personal property incident to service on a DD Form 1842 and noted that Item 71 was missing and that it contained "one set of my DVD's collections 275." After the Army initially rejected the member's

claim for the DVDs, on October 10, 2002, the member provided a written statement, in his own words, ⁽³⁾ to the Staff Judge Advocate at the installation processing his claim, in which he stated that he kept his DVDs in the plastic bin Item 71. The member noted that Item 23, a 1.5 cubic foot carrier packed carton described as "Books DVD" did not contain any DVDs when he opened it. The member's *List of Property and Claims Analysis Chart* (DD Form 1844) itemized 109 DVDs with replacement costs and date of purchase for each. The Army's administrative report noted that the member did ship a DVD player at Item 12.

In our April 28, 2004 decision, we concluded that American could be charged with loss even if the items were not listed on the inventory because other circumstances were sufficient to establish that the goods were tendered and lost. We also noted that, absent 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.

In its July 30, 2004 correspondence supporting its second request for reconsideration, American seeks reversal of our decision based upon its contentions that: (1) it is "based upon a single unsupported non sworn self serving questioning statement made by the shipper," (2) "an Army E5 would not have allowed an expensive collection of DVD's to leave his quarters without first being listed upon the inventory," and (3) American would not have left the collection in a "non securable plastic bin." American also argues that our decision is erroneous because it failed to consider a variety of factors or offer an explanation as to why those factors were "not rebuttal acceptable."

Discussion

American's request for reconsideration of our decision was made to the Deputy General Counsel (Fiscal), by letter dated July 30, 2004. The letter was received by that office on August 11, 2004. On June 29, 2004, a new claims regulation was published in the Federal Register concerning the proper procedures for requesting reconsideration of DOHA decisions. The new regulation, which is found at volume 69, Federal Register, pages 38843 to 38848 (title 32, Code of Federal Regulations, Part 282), went into effect on May 12, 2004. With respect to appeal decisions issued before the effective date of the new regulation, a request for reconsideration by the Deputy General Counsel (Fiscal) must have been received within 60 days of the regulation's effective date. American's request was received after that date. Therefore, the Deputy General Counsel (Fiscal) forwarded American's request to our office for further action.

A *prima facie* case of carrier liability is established by showing that the shipper tendered property to the carrier, that the property was not delivered or was delivered in a more damaged condition, and the amount of damages. *See Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). The burden then shifts to the carrier to rebut the *prima facie* liability. Normally, if household goods are not listed on the descriptive inventory, the carrier will not be charged with tender. *See* DOHA Claims Case No. 96070203 (September 5, 1996). However, a carrier can be charged with loss even if items are not listed on the inventory, where other circumstances are sufficient to establish that the goods were tendered and lost. *See* DOHA Claims Case No. 03041004 (April 17, 2003); DOHA Claims Case No. 96070203, *supra*; and B-235558.4, Mar. 19, 1991.

As we noted in our decision, the Army should have obtained a more specific and detailed statement from the member linking the plastic bin to the DVDs at origin; however, the minimal evidence the Army offered is sufficient to establish a *prima facie* case of liability. While the member did not express himself in an articulate manner, he made it clear from the beginning, on official documentation, that Item 71 was missing and that the inventory was not correct. The member's written statement, a document clearly exhibiting self-preparation, and which the member signed and provided to the Army just shortly after delivery, explains that the DVDs were kept in Item 71 and were missing from carrier-packed Item 23 (where the member expected to find them). The presence of a DVD player in the inventory infers that the member owned and likely shipped DVDs. In contrast, American offered no evidence from its representative at origin indicating the disposition of the DVDs in Item 23 or the contents of Item 71. 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. *See* 57 Comp. Gen. 415, 419 (1978).

American's contentions, that an Army E5 would not have allowed an expensive collection of DVD's to leave his

quarters without first being listed upon the inventory and the carrier would not have left the collection in a non-securable plastic bin, are speculative assertions for which American offers no legal or evidentiary support. Moreover, American offers no rationale as to why or how a consideration of the various factors it lists in its reconsideration request would result in a different outcome in the case, and we are not permitted to guess as to possible theories of recovery that the American may have had. *See* DOHA Claims Case 04072708 (August 4, 2004) citing Reconsideration of DOHA Claims Case No. 04042701 (April 28, 2004). *aff'd* Deputy General Counsel (Fiscal)(July 6, 2004).

Conclusion

For the reasons stated, the second request for reconsideration is denied, and the appeal decision is sustained. No further action is required by the Army Claims Service. In accordance with 32 C.F.R. Part 282, Appendix E, paragraph o(2), this is the final Department of Defense action in this matter.

/s/
Michael D. Hipple
Chairman, Claims Appeals Board

/s/
William S. Fields
Member, Claims Appeals Board

/s/
Jean E. Smallin
Member, Claims Appeals Board

1. This shipment involves Personal Property Government Bill of Lading JP-078,024 and Army Claim No. 03-171-0025.
2. Most of American's appeal document was rambling and incoherent. For example, American indicated that there was more than one shipment under the bill of lading, but it did not explain how many or the significance of this. A fact finder might expect a carrier in such a situation to offer evidence indicating that the carrier delivered DVDs in another delivery, but American simply left that unresolved with the Army. American stated that some storage bins were not suitable for transport, and criticized DOHA for not explaining that. We did not know what if anything that had to do with the missing storage bin or DVDs, or what error DOHA committed and why such error would have been substantial.
3. Grammar, spelling, and similar mistakes are apparent.