DATE: August 9, 2004

In Re:

A&A Transfer & Storage, Inc.

Claimant

Claims Case No. 04071901

CLAIMS APPEALS BOARD

RECONSIDERATION DECISION

DIGEST

If a claimant's request for reconsideration cites error in the appeal decision for not explaining certain topics, the claimant must offer a rationale as to why and how a discussion of the various 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

A&A Transfer & Storage, Inc. (A&A) requests that the Department of Defense reconsider the April 29, 2004, decision of this Board in Defense Office of Hearings and Appeals (DOHA) Claims Case No. 04042702.[(1)]

Background

Essentially, the dispute between A&A and the Navy on the shipment of a service member's household goods involves a damaged Gateway computer (Item 207), damaged end tables (Item 212 described by the carrier as "decorations"), damaged table legs (Item 213 also described by the carrier as "decorations") and a damaged futon frame (Item 261). Generally, A&A contends that the record does not show that the shipment was picked up on May 25, 2001. A&A contends that DOHA "erred" in finding A&A liable for the computer because: the 3-year old computer was returned without external damage; the service member failed to complete paragraph 3 of the Electrical/Electronic Repair form and state a reason why he believed the computer damage was caused by impact; the service member did not provide "a specific day" on this form; the manufacturer's service center did not state what was physically wrong with the drives, motherboard and keyboard other than saying that there was a "catastrophic failure;" and a keyboard is not an internal component.

As to Items 212, 213 and 261, A&A contends that the Navy had already agreed that A&A was not liable for the damages to 212 and 261; DOHA "does not explain how it validated" that end tables and table legs were "decorations;" DOHA does not explain how two end tables can be delivered in a 4.5 cubic feet carton; A&A offered rebuttal evidence

concerning the end tables; and DOHA "did not explain how it validated" that it was not economical to repair the futon frame and that the frame was "destroyed."

Discussion

Previously, our Office would have referred a request for reconsideration to the Deputy General Counsel (Fiscal), Department of Defense (DoD). However, DOHA has been advised that a new claims instruction, DoD Instruction 1340.21 (codified in title 32 of the Code of Federal Regulations (CFR), Part 282) was published in the Federal Register on June 29, 2004. The new instruction can be found at volume 69, Federal Register, pages 38843 to 38848. With respect to DOHA appeal decisions issued before the effective date of the new instruction that denied all or part of a claim, the instruction provides that a request for reconsideration by the General Counsel may be submitted within 60 days of the effective date of Part 282, but requests received more than 60 days after the effective date of this part shall not be accepted. *See* 32 C.F.R. Part 282, Appendix E, paragraph k. The effective date of Part 282 is May 12, 2004. *See* 69 F.R. at page 38843. DOHA received A&A's request for reconsideration on July 17, 2004, more than 60 days after the effective date of Part 282. Accordingly, we cannot forward its request to the Office of General Counsel. We will consider A&A's request under our reconsideration authority in Part 282.

Preliminarily, for purposes of this reconsideration, we accept A&A's argument that the record evidence does not show that the pick-up date is May 25, 2001. While the Administrative Report states that the bill of lading was issued on that date, other documentation in the record shows that A&A picked up the shipment on June 27, 2001.

Otherwise, except as noted hereafter, A&A does not specify why each alleged error constitutes an error of fact or law. To the extent that the alleged error involved a fact or factual conclusion, A&A did not indicate the correct set of facts based on specified record evidence, and how that fact would change the outcome. To the extent that the alleged error involved law, A&A did not describe the proper legal principle, the authority supporting it, and how the principle applied to this case. A&A believes that DOHA failed to explain various topics, but A&A has not offered a rationale as to why or how a discussion would lead to a different outcome. *See*, *e.g.* , *Reconsideration of DOHA Claims Case No. 04042701* (April 28, 2004), *affd'd* Deputy General Counsel (Fiscal) (July 6, 2004). Moreover, A&A's rationale in some instances is not clear, and unless a claimant's theory of recovery is reasonably clear, we cannot consider it. *See e.g.*, *Reconsideration of DOHA Claims Case No. 04041601* (April 27, 2004), *aff'd* Deputy General Counsel (Fiscal) (July 6, 2004).

Concerning the computer, A&A complains that the member's statement did not provide "a specific day." It is not clear to us what day A&A's representative is thinking about, what duty the member had to place such a date on the form, and how it would affect the outcome. A&A complains that the damage was internal, and the appeal decision agreed with A&A. However, the appeal decision provided a specific reason for carrier liability notwithstanding the internal nature of the damage. A&A merely repeats that the damage was internal without providing specific legal authority that demonstrates that the Board's rationale was not appropriate and/or not legally supported. Overall, the record evidence is sufficient to support a *prima facie* case of liability against A&A: the member stated that his computer worked when he used it in June 2001 prior to pick-up; it did not work after A&A delivered it to the member; several specified components were found damaged by the repairer, that ordinarily do not fail to such a widespread extent; and the cost was specified. Against this record, A&A offered no contrary evidence.

With regard to Items 212 and 213, it is clear that A&A questions its *primafacie* liability where the inventory description ("decorations") appears unrelated to the contents claimed (end tables and table legs). As a general rule, it is proper for a carrier to investigate claims where such differentiation exists. However, the appeal decision noted that there is an exception to this general rule where the circumstances are sufficient to establish that the goods were tendered and lost. With regard to Item 212, the goods (although damaged), were delivered, which is deemed to be circumstantial evidence of tender. The appeal decision cited applicable legal authority.

The appeal decision had to consider this record evidence and legal authority against a record in which A&A merely relied on superficial differences and did not perform any inspection or offer any rebuttal evidence. In contrast, the table legs were not delivered and the appeal decision found for A&A. We do not understand why A&A raised the issue of Item 213 in this reconsideration request, since the Board found for A&A with respect to that item.

A&A contends that it provided "rebuttal evidence" that two end tables cannot have fitted into a 4.5 cubic feet container. The record indicates that the end tables were delivered; however, even if the size of the end tables had been critical, our review of the record does not show that A&A provided clear and convincing evidence, through inspection or otherwise, upon which we can draw the factual conclusion that A&A asks us to draw. Our review included A&A's April 22, 2004, appeal correspondence in which it stated that a 4.5 cubic feet container measures approximately 18" X 18" X 24," but neither that assertion, nor anything else in the record, convinces us that it was not possible to ship the tables in such a container. Assuming for purposes of discussion that the dimensions of the container actually used were as A&A suggests, depending on the nature of end table, it is possible to ship such tables in a container with these dimensions in a knocked down or disassembled condition. Even though our appeal decision did not find for the Navy on Item 213, correspondence in the record suggests that the Navy believed that Item 213 was knocked down. Accordingly, Item 212 could have been shipped in such a condition. It is the duty of A&A to convince the government that the two end tables claimed, not end tables generally, could not have fit into the container involved, and A&A failed to do so.

A&A suggests that the Navy "agreed" that A&A was not liable for Items 212 and 261, but did not identify or attach correspondence showing that the Navy did so. A&A states that DOHA "invalidated the Navy's withdrawal of carrier liability on Item 261," but the Navy's December 9, 2003, Administrative Report, which transmitted the Navy's initial determination to us, as well as the Navy's September 26, 2003, correspondence to A&A, clearly sought recovery from A&A on Item 261. A&A's allegations are without merit.

Finally, A&A failed to identify the basis for DOHA's alleged duty to A&A to "validate" comparative repair and replacement costs with regard to Item 261. It is the duty of the carrier to offer evidence on proper repair or replacement costs for our consideration.

Conclusion

For the reasons stated, the request for reconsideration is denied, and the appeal decision is sustained. 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. Under 32 C.F.R. Part 282, Appendix E, paragraph o(1)(iv), the remaining appropriate action is that the Navy and/or the Defense Finance and Accounting Service refund $99.99, as specified in the appeal decision, if this amount has not already been refunded. Otherwise, AAA's claim is disallowed, and no further action is required.

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

cc: A&A, Naval Support Activity

1. This matter involves Personal Property Government Bill of Lading AP-745,551, Navy Claim No. 0205911. The appeal decision mistakenly identified the claimant as AAA Transfer & Storage rather than A & A Transfer & Storage. Under former procedures, DOHA issued a Settlement Certificate under DOHA Claim 03121201 on January 12, 2004.