

DATE: November 10, 2004

In Re:

American Van Services, Inc

Claimant

Claims Case No. 04110201

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Where a carrier offers no rationale as to why or how a consideration of the various assertions it lists in its reconsideration request would result in a different outcome in the case, we are not permitted to guess as to possible theories of recovery that the carrier may have had. The theory of recovery must be reasonably clear.

DECISION

American Van Services, Inc. (AVAS) requests reconsideration of the September 30, 2004, Appeal Decision of the Defense Office of Hearings and Appeals in DOHA Claim No. 04072603. [\(1\)](#)

Background

The record indicates that the household goods of a Marine Corps service member were picked up from the member's residence in Jacksonville, NC in July 2001 and were delivered to the member in Atlanta, GA on August 15, 2002. A *Notice of Loss or Damage* (DD Form 1840R), reporting additional transit damage after delivery, was dispatched within 75 days of delivery.

Generally AVAS's request for reconsideration is rambling and confusing. Essentially, it is a one page letter containing a mixture of requests, unsupported factual assertions, and unsupported factual and legal conclusions, in no meaningful

order. It contains no rationale for why or how our consideration of these assertions would result in a different outcome.

(2) The following issues are raised generally and will be addressed generally: (a) AVAS has no contractual obligation to gather evidence such as an after-delivery inspection, a driver's statement or its own repair estimate to support its case; (b) DOHA has a duty to supervise the claims process by directing the Navy to provide certain documents or respond promptly to carrier correspondence; and (c) the member's signature on the inventory establishes that the pre-existing damage (PED) noted on the inventory is correct while the repair estimates do not distinguish among wear and tear, transit damage and PED.

Discussion

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 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 *prima facie* 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. The appeal decision and other documentation in the record noted specific instances where the damage claimed greatly exceeded whatever was listed as PED. 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. But the carrier is liable when the record shows that the condition of an item at delivery is more damaged than the described PED (*e.g.* , an item that was delivered "totally destroyed").

AVAS argues that it is under no contractual duty to obtain statements from the driver, inspect the delivered item, or otherwise develop evidence to support its position. However, as we have previously held, a carrier has a duty to investigate a claim: it cannot shift the burden of that responsibility to the claimant, nor can it avoid liability by failing to investigate the claim or by failing to thoroughly investigate it. *See DOHA Claims Case No. 98021009* (March 5, 1998). If the record does not support the carrier's position by clear and convincing evidence, the operation of the *prima facie* rule may prevent the carrier from prevailing. 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 DOHA Claims Case No. 01060501* (June 20, 2001) *aff'd* Deputy General Counsel (Fiscal) (March 8, 2002) citing 57 Comp. Gen. 415, 419 (1978).

Finally, our review of the governing regulation, DoD Instruction 1340.21, does not indicate that we have any supervisory authority over Service claims offices. Our office is assigned specific appellate duties as provided in the Instruction. AVAS does not refer to any provision of the Instruction, and we are not aware of any, that gives DOHA the authority to order a Service claims office to respond promptly to carrier correspondence. Moreover, we have previously held that issues related to a Service's failure to provide copies of documents generated by the Service, should be addressed to the Service. *See DOHA Claims Case No. 04072708* (August 4, 2004).

Conclusion

For the reasons stated, the request for reconsideration is denied, and the appeal decision is sustained. No further action is required by the Navy. 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.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: William S. Fields

William S. Fields
Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

1. This matter involves Government Bill of Lading AP-893,785; Navy Claim No. 0305645; and AVAS Reference No. 30659.

2. We are not permitted to guess as to possible theories of recovery that the carrier 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). The theory of recover must be reasonably clear.