

DATE: March 30, 2005

In Re:

American International Moving, Corp.

Claimant

Claims Case No. 05032407

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 International Moving, Corp. (AIM) requests reconsideration of the February 23, 2005, Appeal Decision of the Defense Office of Hearings and Appeals in DOHA Claim No. 05020209. [\(1\)](#)

Background

The record indicates that the household goods of a Marine Corps service member were picked up from Escondido, CA, in January 2003 and were delivered to the member in Radcliff, KY, on April 3, 2003. On the DD Form 1840, which was signed by the carrier's driver with no exceptions noted, the shipper reported damage to seven different inventory items. On the DD Form 1840R, which was dispatched on April 28, 2003, the shipper reported damage to five additional items. A review of the record does not indicate that AIM developed evidence to support its position, such as obtaining statements from its drivers concerning the reported damage, ascertaining what damage had occurred by performing an inspection, or taking action to entitle it to a salvage deduction.

AIM's request for reconsideration is an unordered combination of general requests, factual assertions, and legal conclusions. It does not focus in detail on any individual item at issue and contains no rationale as to why or how our consideration of its assertions would result in a different outcome with respect to any of those individual items.⁽²⁾ Instead, it asserts, for the most part, general positions that the Appeal Decision should be reversed because: (a) AIM had no contractual obligation to gather evidence such as an after-delivery inspection, a driver's statement, or its own repair or replacement estimates to support its case; (b) the Navy was tardy in responding to AIM's correspondence; (c) the DD Form 1840 in the Navy's administrative report was fraudulently altered by the shipper; (d) the Navy erred in making a fair and reasonable award for damages with respect to several items, without providing AIM with an explanation as to why; and (e) AIM was denied salvage with respect to several items.

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 on 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. In this case, the shipper established its *prima facie* case, and AIM has produced no such evidence to overcome it.

AIM's argument that it was under no contractual duty to obtain statements from the driver, inspect the delivered items, or otherwise develop evidence to support its position is without merit. We have previously held that 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. 04110201* (November 10, 2004) citing *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. We have also previously noted that our 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. AIM 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. *See DOHA Claims Case No. 04110201, supra.*

AIM's contention that the DD Form 1840 found in the Navy's administrative report was fraudulently altered by the shipper is not persuasive. In support of that contention, it submits a version of the DD Form 1840 in which the section relating to loss or damage is blank. The burden of establishing fraud rests upon the party alleging it, and must be proven by evidence sufficient to overcome the presumption of honesty and fair dealing. Circumstantial evidence is competent if it affords a clear inference of fraud and amounts to more than suspicion or conjecture. If, however, the circumstances are as consistent with honesty and fair dealing as with dishonesty, the finder of fact must draw an inference of honesty. *See DOHA Case No. 03100615* (October 20, 2003) citing B-255226 (Mar. 24, 1994) and B-207393 (May 23, 1983). AIM has not met its burden of establishing fraud. The mere submission of a different version of a document from the

version found in the administrative report, standing alone, does not constitute clear and convincing evidence that the version of the document found in the administrative report has been fraudulently altered. 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).

AIM's contention that the Navy erred in making a fair and reasonable award for damages with respect to several items, without providing AIM with an explanation as to why, is also without merit. AIM offers no clear and convincing evidence, or specific argument, as to why the Navy's approach in this regard was unreasonable. Generally, we accept the Service's calculation of damages in the absence of clear and convincing contrary evidence. *See* DOHA

Claims Case No. 04050401 (May 5, 2004) citing DOHA Claims Case No. 96070221 (October 7, 1996), *aff'd* Deputy General Counsel (Fiscal)(December 21, 2001).

Finally, AIM's assertion that it was denied salvage with respect to several items is not timely. AIM did not make that assertion in its initial appeal to this Office. As a general rule, this Board will not review a claim based on a theory of recovery, including one based on new evidence or new material facts, that was not raised by the claimant during its initial appeal to this Office. If AIM had evidence that it was denied salvage, it should have presented that evidence earlier in the process. The piecemeal presentation of a claim is inconsistent with a proper fact-finding process and is wasteful of government and carrier resources. Early and full presentation of a claim allows issues to be fully developed by both sides in a dispute. This Board cannot properly adjudicate a claim and render an appropriate decision in the absence of full factual development in the claim record. *See* DOHA Claims Case No. 04041302 (April 21, 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.

/s/

Michael D. Hipple
Chairman, Claims Appeals Board

/s/

Jean E. Smallin
Member, Claims Appeals Board

/s/

William S. Fields
Member, Claims Appeals Board

1. This matter involves Government Bill of Lading (GBL) No. ZY-068,300; Navy Claim No. 0406473; AIM Claim No. 0406473.
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.