September 15, 2005

In Re:

Stevens Transportation Co., Inc.

Claimant

Claims Case No.05072907

CLAIMS APPEALS BOARD

RECONSIDERATION DECISION

DIGEST

A compromise offer of settlement is not binding on the service unless accepted by the carrier. If the offer is not accepted by the carrier, the service may set off the full amount of the carrier's contractual liability, whether or not it exceeds the amount of the proposed compromise.

When a carrier timely invokes its rights to inspection and the member has items repaired before the carrier has the opportunity to inspect, the carrier must have a substantial defense involving facts discoverable by inspection of the specific items to overcome a *prima facie* case of liability. Where the carrier does not provide clear and convincing evidence of a substantial defense, the carrier remains liable for the damage.

DECISION

Stevens Transportation (Stevens) requests a reconsideration of the June 29, 2005, Appeal Decision in Defense Office of Hearings and Appeals (DOHA) Claim No. 05031505.[(1)]

Background

Stevens picked up the shipment in Isle of Palms, South Carolina, on June 27, 2000, and delivered it to Conyers, Georgia, on August 11, 2000. Upon delivery Stevens' agent and the shipper signed the Joint Statement of Loss or Damage at Delivery (DD Form 1840). A Notice of Loss or Damage (DD Form 1840R) was dispatched to Stevens on October 19, 2000. On November 7, 2000, Stevens did perform an inspection of the reported damage. On June 6, 2001, the Navy dispatched to Stevens a Demand on Carrier/Contractor (DD Form 1843) for $3,927.56.

On July 13, 2001, Stevens made an offer to settle the claim for $1,086.23 based on its denial of liability for certain items. On February 19, 2002, the Navy responded agreeing to compromises on various items but disagreeing on other items. As a result, the Navy made a compromise offer to settle in the amount of $2,686.77. On March 4, 2002, Stevens responded, thanking the Navy for its acceptance of compromise to various items but continued to take exception to the other items. On March 12, 2002, in its final demand letter for the claim, the Navy reasserted its position on the various items, stating that Stevens' liability remained at $2,686.77, and again advised Stevens to forward a check in that amount within 30 days, otherwise setoff would be initiated. On March 21, 2002, Stevens responded with an offer of $1,107.73. On June 11, 2002, the Navy set off $3,927.56 against Stevens. On August 29, 2002, Stevens requested a refund in the amount of $2,819.83 ($3,927.56 minus $1,107.73). Stevens asserted that the main areas of dispute were acceptance of their offer by the Navy, pre-existing damage, proof of tender, and inspection rights. On October 17, 2002, the Navy responded to the carrier's request for refund, allowing a refund in the amount of $508.75.

On January 11, 2005, Stevens appealed the Navy's decision to our Office. In its appeal, Stevens asserted that it was due a $677.77 refund for items that were part of a compromise settlement offered by the Navy on February 19, 2002, and that it contends Stevens accepted on March 4, 2002. Stevens further asserted that it was due refunds for a sewing

machine and a sofa ($25 and $110 respectively) because the items were repaired prior to the carrier's inspection. Finally, Stevens contended that it was due a refund in the amount of $1,095.59 for items with no inventory numbers but claimed as missing by the member. Therefore, Stevens requested a refund in the total amount of $1,908.36. However, on January 18, 2005, our Office returned the appeal to Stevens for failure to follow procedure under Department of Defense Instruction 1340.21. On March 7, 2005, Stevens resubmitted an amended appeal through the proper channels. In the amended appeal, Stevens requested a refund of $632.77, which represents the difference between the amount set off and the amount Stevens alleges was part of the Navy's legally binding compromise offer ($1,131.62 minus $498.85). Stevens also reasserted the issues of inspection rights and proof of tender. Stevens requested a refund in the amount of $1,863.36.

In the Appeal Decision, DOHA Claim No. 05031505, our Office denied the claim. On July 29, 2005, Stevens requested reconsideration of that decision. Stevens cites error in the Appeal Decision, raises the same issues in its request for reconsideration as in its amended appeal, and cites DOHA Claims Case No. 96080215 (March 6, 1997), in support of its argument that Stevens accepted the Navy's compromise offer of settlement for certain items, thus relieving the carrier of liability for those items.

Discussion

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. The burden then shifts to the carrier to rebut the *prima facie* case of liability. *See Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964).

A compromise offer submitted to the carrier by an agency to settle a loss and damage claim does not bind the agency unless accepted by the carrier. Upon carrier rejection, the agency may set off monies otherwise due to the carrier up to the carrier's full contractual liability, whether or not they exceed the amount of the proposed compromise. *See* DOHA Claims Case No. 96070214 (January 6, 1997); B-247770, July 17, 1992; and B-216221, Oct. 12, 1984.

There is nothing in the record that shows Stevens accepted the Navy's February 19, 2002, compromise offer of settlement. The Navy's compromise offer came in the course of negotiations and in specific response to Stevens' letter of July 13, 2001. Stevens' letter of July 13, 2001, listed various items in the shipment with corresponding amounts it would accept as settlement; Stevens offered $1,086.23 in full settlement and enclosed a draft in that amount. On February 19, 2002, the Navy responded, accepting Stevens' offered settlement on certain items, but rejecting Stevens' offered settlement on other items and providing specific rebuttal for those items. In this letter, the Navy clearly expressed the terms of its compromise offer of settlement; the Navy stated the liability of the carrier stood at $2,686.77, instructed the carrier to forward a check to the order of the United States Treasury in that exact amount, and provided a specific time limit within which their offer had to be accepted (30 days of the date of the letter).[(2)] The Navy stated that if a check was not received, the file would be sent for set off without further notice. On March 4, 2002, Stevens responded, did not enclose a check for $2,686.77 as required by the Navy's terms, and continued to argue its position on the various other items.[(3)] On March 12, 2002, the Navy sent a response reiterating its position that carrier liability stood at $2,686.77, and that the Navy considered its letter as final demand for the claim. On March 21, 2002, Stevens enclosed a draft in the amount of $21.50, bringing its total allowed payment to $1,107.73. Since the carrier had not forwarded a check in the amount of $2,686.77, as instructed by the Navy in both its February 19, 2002, and March 12, 2002, letters, there was no acceptance of the Navy's offer, and the Navy had sufficient justification to set off the full amount of the debt.

Although Stevens cites DOHA Claims Case No. 96080215, *supra*, in support of its position, we find this case distinguishable from the facts present here. In the present case, the Navy specifically expressed the mode and terms of acceptance of its compromise offer of settlement, making clear that in order to accept, the carrier must agree to the entire settlement offer. *See* DOHA Claims Case No. 01092401 (November 13, 2001), wherein the Board distinguished and narrowed its decision in DOHA Claims Case No. 96080215, *supra*.

Stevens also states that because two items were repaired prior to its agent's inspection, it was denied its right to confirm the damages claimed. The record shows that the items in question, item #282 - sewing machine and item #30 - rattan sofa, were repaired prior to the carrier's inspection on November 7, 2000. The file contains an estimate for both items

dated October 3, 2000, from the shipper's repair firm. Neither item was listed on the DD Form 1840, but both were listed on the subsequent 1840R dispatched to the carrier on October 19, 2000.

The Military-Industry Memorandum of Understanding on Loss and Damage Rules (MOU) permits the carrier to exercise its inspection rights within 75 days from the date of delivery or 45 days of dispatch of the DD Form 1840R, whichever is later. The carrier cannot avoid liability solely on the basis of no opportunity to inspect. However, the carrier will not be held liable when it aggressively protects its rights to inspection within the time allowed; the member discards (repairs) the items within that time period and before the carrier had the opportunity to inspect; and the carrier has a substantial defense involving facts discoverable by inspection. *See* DOHA Claims Case No. 03010605 (January 24, 2003) and DOHA Claims Case No. 96070233 (February 18, 1997).

Stevens conducted the inspection within in the time period stated in the MOU. However, the shipper had repaired the sewing machine and rattan sofa before the inspection. There is nothing in the record to show that the shipper's actions were a deliberate attempt to deny the carrier its inspection rights. The only defense Stevens seems to be advancing is that it was denied an opportunity to verify the damage. However, the damage to both items was verified by the repair estimate obtained by the shipper. The repair person noted that damage to both items occurred in-transit. In addition, the record reflects new and different damage than the pre-existing damage noted on the inventory for each item.

At origin, the rattan sofa was listed as "torn cushion bed; cushions packed; scratched, rubbed, dented, chipped . . . " In the shipper's October 15, 2000, letter to his Property Office, he states that the sofa was purchased a few months prior to the move, was being stored and was to be used in his new home. He states that it had "two small nicks." He further stated, "Upon arrival, it looks as though someone gouged most of it." On the 1840R dispatched October 19, 2000, the shipper wrote that it had excessive dings/dents and rubs. The shipper also took photographs of the rattan sofa. The shipper wrote next to the photographs taken, "rubs and scratches on sofa," and "bottom of sofa, these were all had scratches and dings - there are the scratches on the back." The estimate of repair for the rattan sofa was listed as costing $110 ($95 for the work and $15 for the materials). On carrier's repair firm's inspection report dated November 7, 2000, the sofa was listed as repaired by shipper. On the DD Form 1844, the damage was listed as "excessive dings, scratches across wood bottom, scuffs all over rattan - newly purchased - had never been used - was in storage area to use in new home," and the repair cost was listed as $110. As for the sewing machine, at origin it was listed as cracked front, top left and right. The cost of repairing this item was $25. On the 1840R dispatched to the carrier on October 19, 2000, the damage listed was "door falling off." On the DD Form 1844, the sewing machine was described as being in a wood cabinet, and the wood cabinet door was described as falling off. Therefore, the record contains substantial evidence that new damage occurred to both the sofa and sewing machine during transit.

As for the items listed as missing that did not have inventory numbers, a review of the inventory reflects that these items are listed. For those items that do not seem to be found on the inventory, a carrier can still be charged with the loss where other circumstances are sufficient to establish that the goods were tendered and lost. *See* DOHA Claims Case No. 04042702 (April 29, 2004), *aff'd* Deputy General Counsel (Fiscal), August 9, 2004. In this case, the shipper presented a written statement regarding his knowledge of these items, that they had been tendered but not delivered.

Thus, the record evidence was sufficient to establish a *prima facie* case of liability on the part of the carrier and the value of the items in question. We affirm the Appeal Decision's denial of the carrier's claim.

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.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

_____/s/_____

Catherine M. Engstrom

Member, Claims Appeals Board

1. This matter involves Personal Property Government Bill of Lading AP-317,241; Navy Claims No. 020020.

2. *See* Corbin on Contracts § 3.34 (2005 ed.) The party making the offer (offeror) is proposing the exchange and can set the mode of acceptance. Therefore, in order to accept the offer, the other party (offeree) must give that for which the offeror bargains. There is no contract if the offeree's response is in any material respect different.

3. *See* Corbin on Contracts § 3.35 (2005 ed.) A counter-offer, although not a specific rejection of the offer, generally has the same legal effect as a rejection.