

DATE: June 1, 2006

In Re:

Midwest Moving & Packing, Inc.

Claimant

)
Claims Case No.06042742

CLAIMS APPEALS BOARD

RECONSIDERATION DECISION

DIGEST

A carrier can be held liable for loss even if items are not listed on the inventory, where other circumstances are sufficient to establish that goods were tendered and lost.

DECISION

Midwest Moving & Packing, Inc., (Midwest) requests reconsideration of a Defense Office of Hearings and Appeals' (DOHA) appeal decision, DOHA Claims Case No. 06013102 (March 29, 2006).

Background

Midwest requests a refund in the amount of \$1,373.64, the amount offset for missing jewelry items. Specifically, the shipper reported various pieces of jewelry as missing on the DD Form 1840 and the DD Form 1840R. When the shipper filed a claim with the Navy for loss and damage, the Navy originally disallowed payment for the missing jewelry. The shipper then submitted additional evidence which included a statement from his wife. The Navy determined that a *prima facie* case of liability for the missing jewelry was established.

In the March 29, 2006 appeal decision, the adjudicator concluded that Midwest could be charged with the loss of the jewelry even if the items were not listed on the inventory because other circumstances were sufficient to establish that the goods were tendered and lost.

In its request for reconsideration, Midwest attempts to discredit the member's wife's version of events. However, Midwest only raises questions and speculative assertions without providing any evidence in rebuttal to the *prima facie* case made against it. Midwest also asserts that the appeal decision supersedes the Defense Transportation Regulations (DTR), in that Department of Defense (DoD) Regulation 4500.9-R specifically indicates that a contractor will not be liable for any loss of jewelry not specifically listed on the warehouse receipt.

Discussion

A *prima facie* case of carrier liability is established by showing that the shipper tendered the 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* case against it. 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. 04082451 (August 31, 2004).

As set forth in the appeal decision, the member's wife submitted a statement recounting the circumstances behind the tender and the discovery of loss of the jewelry. She explained that the packers rushed over to pack the shipment 24 hours earlier than expected (only giving her 20 minutes notice) due to the impending arrival of Hurricane Isabelle. She said that six to seven packers were jammed into their house and as a result, she and her husband were not able to keep an eye on what was packed in every room, and specifically unable to keep an eye on the packing that occurred in the bedroom. When the packers left, they tried to inventory everything that had been packed and soon discovered that her watch was missing from the bathroom. She called the packing/moving company to report the loss and was told to file a police report. They decided to wait until the shipment was delivered to see if the watch was thrown in another box. She stated that at delivery, she found individual empty jewelry boxes that had been thrown in the boxes. She said that she had specifically packed the jewelry in these boxes and placed them in a larger box to take with her to the new home. She said that the larger box was untaped and almost all the jewelry was taken out of the individual boxes. She immediately called the moving company to report what she had discovered and again was told to make a police report. Based on this statement, the Navy determined that a *prima facie* case of liability for the missing jewelry was established.

In contrast, the carrier has presented no evidence to show that the items were not tendered and lost. In absence of clear and convincing contrary evidence on disputed questions of fact between the carrier and the administrative office, we accept the statement of fact furnished by the administrative office. *See* DOHA Claims Case No. 04082451, *supra*, DOHA Claims Case No. 04051401 (May 21, 2004), DOHA Claims Case No. 01060501 (June 20, 2001) *aff'd* Deputy General Counsel (Fiscal) (March 8, 2002) citing 57 Comp. Gen. 415, 419 (1978).

The carrier does not specify which provision of the Defense Transportation Regulations contains the prohibition on charging a carrier with loss of jewelry shipped in household goods. Our review of Part IV (Personal Property) of the Defense Transportation Regulations 4500.9-R indicates two potentially applicable provisions that affect the liability of firms that are involved in handling personal property in non-local, domestic moves: (a) Appendix B, the Tender of Service, that applies to carriers; and (b) Appendix J, the Basic Ordering Agreement for Storage of Personal Property and Related Services. The Personal Property Government Bill of Lading that Midwest accepted in this case indicates that the shipment moved as a Code 1 shipment (domestic motor van), for which Midwest was responsible, door to door, as a common carrier. It did not perform services as a storage contractor in this instance and cannot invoke the provisions of Appendix J. Under the Tender of Service, which did apply, there is no language that suggests the carrier cannot be held liable for loss of jewelry. We note under section Y, Packing Requirements, of the Tender of Service, the carrier agrees to the responsibility of inspecting "all prepacked goods to ascertain the contents, condition of the contents, and that only articles not otherwise prohibited by the carrier's tariff/tender are contained in the shipment." Thus, we find no error in the appeal decision.

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/_____

Christine M. Kopocis

Member, Claims Appeals Board

_____/s/_____

Catherine M. Engstrom

Member, Claims Appeals Board