DATE: June 29, 2006

In Re:

Burnham World Forwarders, Inc.

Claimant

)

Claims Case No. 06062318

CLAIMS APPEALS BOARD

RECONSIDERATION DECISION

DIGEST

The Defense Office of Hearings and Appeals will not question an agency's calculation of the value of the damages to items in the shipment of an employee's household goods unless the carrier presents clear and convincing evidence that the agency acted unreasonably.

DECISION

Burnham World Forwarders, Inc. (Burnham) timely requests reconsideration of the May 30, 2006, Appeal Decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 06042402,[(1)] involving Personal Property Government Bill of Lading ZY-669,537.

Background

The matter in dispute involves the proper measure of damages for the repair of mold and/ or mildew on two sofas in a shipment of an employee's household goods (Inventory Items 320 and 326). Burnham, the carrier, contends that it had the items professionally cleaned and that there is no evidence that the mold/mildew stains remained after it had them cleaned. Burnham states that its representative spoke with the employee/shipper two days after they were cleaned and the employee advised the representative that she was satisfied with the cleaning.[(2)] Burnham contends that it supplied the Navy with evidence that it had the two sofas cleaned, and was not advised until about a year later (when it received the Demand on Carrier in 2005) that the cleaning failed to remove the mold and/or mildew. Knowing that the carrier had the items professionally cleaned, Burnham contends that the Navy erred in not requiring proof from the member that the cleaning failed to remove the mold and/or mildew, and the Navy simply accepted the employee's undocumented word that the sofas were not cleaned without timely advising the carrier of its intention to do so.[(3)] In summary, Burnham's position is that the employee (and Navy in subrogation) failed to establish a *prima facie* case of liability against it for the amount of damages claimed to replace the two items ($1,044.39 for Item 320 and $774.34 or Item 326).

The record shows the cost and description of a replacement item that the Navy found comparable to Item 320 (Exhibit 8 to the DD Form 1844) and one that it found comparable to Item 326 (Exhibit 19 to the DD Form 1844).

Discussion

To establish a *prima facie* case of liability against the carrier, the shipper must show tender in good condition, delivery in a damaged condition, and the amount of the damages. *See Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U. S. 134, 138 (1964). The first two elements are not in dispute; the employee/shipper showed that the carrier delivered sofas with mold and/or mildew. The issue in dispute is whether the record contains substantial evidence of the third

element. Burnham does not dispute the calculation of replacement costs, but contends that replacement costs are not appropriate here because the employee and the Navy did not prove that the cleaning failed to repair the damage, and the Navy advised it too late to take additional action.

For the reasons that follow, the Board finds that Burnham's argument that the Navy failed to establish a *prima facie* case of liability against it, is not persuasive. First, as indicated above, the record contains a copy of the DD Form 1844 and other relevant documentation demonstrating depreciated replacement costs for Items 320 and 326, and this is substantial evidence of the third element of the *prima facie* case. *See, e.g., Air Land Forwarders, Inc. v. United States,* 38 Fed. Cl. 547,556-558 (1997), *aff'd in part* 173 F. 3d 1338 (Fed. Cir. 1999). Thereafter, the burden shifted to Burnham to show there was clear and convincing contrary evidence as to the proper measure of damages. *See, e.g.*, *Ambassador Van Lines, Inc.*, B-249072, Oct. 30, 1992, cited in *Air Land Forwarders, Inc., supra* at 558.

Second, even if the Navy should have responded to Burnham's June 2, 2004, letter and advised it that the cleaning of the mold/mildew was not sufficient, equitable estoppel cannot be applied against the government because of the inaction or inattentiveness of its representatives. *See OPM v. Richmond*, 496 U.S. 414, 420-428 (1990), *rehg' denied* 497 U.S. 1046 (1990).

Third, the Navy's application of depreciated replacement costs to the two items was not unreasonable in this situation because the shipper's claim that the mold/mildew stains were not eliminated by cleaning is supported by other record evidence. For example, the record shows mold/mildew damage to other items in the shipment that had to be replaced, and the report from Burnham's own investigator indicated that an upholster needed to provide an estimate for both items, despite the presence of the cleaner's estimate for Item 320.

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.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

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Christine M. Kopocis

Member, Claims Appeals Board

Signed: William S. Fields

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William S. Fields

Member, Claims Appeals Board

1. The Appeal Decision is dated "March 30, 2006," but the record indicates that the file involving the Appeal Decision was closed on May 30, 2006, and case assignment, draft and review took place in late May 2006. We conclude that May 30, 2006, is the proper date of the Appeal Decision, the reference to "March" was a typographical error, and since the claimant's reconsideration request reached us on June 21, 2006, it is timely under DoD Inst. 1340.21.

2. Other correspondence from Burnham states that the employee "did not indicate any dissatisfaction with the cleaning."*E.g.* Burnham letters to the Navy dated February 2, 2006 and arch 16, 2006.

3. The record contains a copy of Burnham's June 2, 2004, letter to the Navy asking it to take into consideration its cleaning of Items 320 and 326 when adjudicating carrier liability. This letter was written only a few weeks after the failed cleaning.