

DATE: February 8, 2007

---

In Re:

Ability Forwarders, Inc.

Claimant

---

)  
Claims Case No. 07020201

**CLAIMS APPEALS BOARD**  
**RECONSIDERATION DECISION**

**DIGEST**

The absence of an inspection report conducted by the carrier from the recommendation and administrative report constituted harmless error where the carrier did not exercise his right to inspection within the time period stated in the Military-Industry Memorandum of Understanding on Loss and Damage Rules, effective January 1, 1992.

**DECISION**

Ability Forwarders, Inc., requests reconsideration of the January 16, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims No. 06121901.

**Background**

The record shows that the carrier picked up the household goods shipment in Plano, Texas, on June 2, 2004, and delivered it to Kings Bay, Georgia, on July 16, 2004. The Notice of Loss or Damage, DD Form 1840R, was dispatched on August 24, 2004. It appears that the carrier inspected the damaged items on October 25, 2004. <sup>(1)</sup> The member disposed of many of the broken and moldy articles before the carrier's inspection.

In its appeal to our Office, Ability asserted that it was denied its salvage rights. Our Office denied Ability's appeal of the Navy's set-off. In its request for reconsideration Ability states that it is not appealing the denial of its refund request. However, Ability contends that there was a factual error in the appeal decision. The appeal decision found no indication in the file that Ability had "attempted to inspect any of the damaged items within the specified time period, even though there were exceptions noted at delivery and further noted on the properly dispatched DD Form 1840R." Ability states that it did perform an inspection of the damages noted on the DD Form 1840R and provided it to the appropriate office. Ability attaches copies of an October 25, 2004, inspection report and of the October 29, 2004, cover letter forwarding the report to the Kings Bay claims office. <sup>(2)</sup> Ability states that since there was no dispute between them and the Carrier Recovery Claims Branch in Millington, Tennessee, as to whether the carrier performed an inspection, Ability did not address this as an issue in response to the administrative report. Ability states that since the Component sends the appeal to DOHA, the carrier has no control over the documents that the Component provides. Thus, Ability asks how it can influence the documents and information that is forwarded to DOHA for review.

**Discussion**

Under federal law in an action to recover from a carrier for damage to a shipment, a *prima facie* case is established by showing delivery in good condition, failure to deliver or arrival in a damaged condition and the amount of damages. The burden of proof then shifts to the carrier to show both that it was free from negligence and that the damage to the goods 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).

The carrier's right to inspect loss or damage is provided by the Military-Industry memorandum of Understanding on Loss and Damage Rules (MOU), effective January 1, 1992. Under the MOU, the presumption of correctness of the delivery receipt is overcome by written notice of additional loss or damage within 75 calendar days of delivery; otherwise, loss or damage noted after delivery is generally presumed not to have occurred in transit. *See* B-261282, Nov. 30, 1995, and B-251343, Apr. 19, 1993. The MOU allows 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. However, the carrier cannot avoid being *prima facie* liable for loss or damage merely because circumstances prevent it from inspection. *See* B-260769, Nov. 1, 1995, and B-251343, *supra*. We have previously held that the carrier will not be held liable when it aggressively protects its rights to inspection within the time period stated; the member discards broken articles within the time period and before the carrier has the opportunity to inspect; and the carrier has a substantial defense involving facts discoverable by inspection. *See* DOHA Claims Case No. 96070233 (February 18, 1997); B-260769, *supra*; and B-251343, *supra*.

In the present case, the inspection report submitted by Ability indicates that the inspection was completed on October 25, 2004. This was more 75 days from the date of delivery (July 16, 2004) and more than 45 days from date of dispatch of the DD Form 1840R (August 24, 2004). Therefore, there is no evidence that Ability aggressively pursued its rights to inspection within the time period stated in the MOU. Even if Ability had exercised its inspection rights within the period stated in the MOU, there is nothing to indicate that Ability would have had a substantial defense which would overcome the *prima facie* case of liability if certain items had been retained for inspection. Although we do note that the inspection report was not included in the appeal file for the adjudicator to review, the adjudicator did not commit error. The adjudicator found that the carrier did not inspect within the time period specified by the MOU, which was correct.

In its appeal to our Office, Ability's main contention was that it was denied its right to salvage in regard to the items that were discarded by the member. However, the Joint Military-Industry Memorandum of Understanding on Salvage, effective April 1, 1989, "does not affect the carrier's claims settlement process, appeals process, or inspection rights." The Memorandum on Salvage "establishes agreement between Military and Industry pertaining to salvage rights." Thus, the absence of the inspection report from the appeal file did not affect the adjudication of the carrier's salvage rights. As noted in the appeal decision, most of the items discarded by the member were hazardous, either moldy or containing broken glass. Under the Memorandum on Salvage, the carrier agrees not to exercise its salvage rights when the item involved is hazardous or dangerous to health and safety. However, certain items (antiques, figurines, and crystal) with a single item value of \$50 or more must be retained for exercise of salvage rights by the carrier. In this case, only one item, the Mikasa crystal vase, was valued at \$50 or more.<sup>(3)</sup> As pointed out by the adjudicator in the appeal decision, the carrier was entitled to a 25% salvage credit for this item since it was unable to exercise its salvage rights. However, the 25% salvage credit for the item would only be \$22.50, and under Joint Military-Industry Agreement, effective May 1, 1987, the carrier agrees not request reimbursement for claims for an amount of \$25 or less. *See* DOHA Claims Case No. 02021401 (March 6, 2002) and B-250492, Apr. 21, 1993.

As for Ability's concern about verifying information sent by the Component to our Office on appeal, we direct their attention to Department of Defense (DoD) Instruction 1340.21, May 12, 2004. Under ¶ E7.4.3, if a carrier appeals the decision of a Component (in this case the Navy), the Component must prepare a recommendation and administrative report and send a copy to the claimant with a notice that the claimant may submit a rebuttal to the Component. Under ¶ E7.6.4, the recommendation and administrative report must include all relevant and material documents as attachments. The claimant may then submit a written rebuttal in response to the recommendation and administrative report.

### **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

---

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

---

Jean E. Smallin

Member, Claims Appeals Board

Signed: Catherine M. Engstrom

---

Catherine M. Engstrom

Member, Claims Appeals Board

1. In its request for reconsideration the carrier supplied a copy of an inspection report that indicates that an inspection was completed on October 25, 2004. This document was not a part of the appeal file supplied by the Navy Claims Service with its recommendation and administrative report.
2. We note that the address Ability lists for the claims office is Kings Bay, California. The shipment was actually delivered to Kings Bay, Georgia.
3. According to the DD Form 1844, List of Property and Claims Analysis Chart, the carrier's liability for this item was \$89.99.