

DATE: April 24, 2007

In Re:

Ocean-Air International, Inc.

Claimant

)
Claims Case No. 07041001

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

A fact finder had a reasonable basis to conclude that there was no evidence of tender of missing items to a carrier who removed goods from a non-temporary storage contractor's storage facility when the items were not listed on the descriptive inventory. The carrier prepared a rider and the member did not provide any substantive evidence of his tender of the items to the carrier.

DECISION

The Carrier Recovery Branch of the Department of the Navy requests reconsideration of the March 28, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07020902. In that decision, our Office allowed a \$1,565.60 refund to the carrier.

Background

Ocean-Air International, Inc., picked up the shipment of household goods from non-temporary storage (NTS) in Benicia, California, on August 17, 2004, and delivered it to Everett, Washington, on August 20, 2004. The member claimed that several items were damaged or missing from the shipment.

In the appeal decision, the DOHA adjudicator allowed the carrier a refund of \$1,565.60 for equipment assembly hardware and parts the member claimed as missing from the shipment because they were not listed on the inventory; there was no statement from the member addressing tender of the items and why they were not listed on the inventory; and the carrier prepared a rider that specifically noted, "all items disassembled not responsible for hardware or reassembly."

The Navy requests reconsideration of the appeal decision. The Navy contends that under the Tender of Service, a carrier picking up a shipment from NTS is required to reassemble items. Therefore, the Navy asserts that the rider prepared by the carrier was invalid. Further, the Navy states that Metro Van and Storage, the NTS contractor, was an agent of Ocean-Air and the carrier cannot take exceptions against itself.

Discussion

Under federal law, in an action to recover from a carrier for damage or loss of an item in transit, 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. *See Missouri Pacific R.R. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). When the goods pass through the custody of several bailees, it is a presumption of the common law that the loss or damage occurred in the hands of the last carrier or forwarder to act as the custodian of the goods. The burden then shifts to the carrier to rebut the *prima facie*

case against it. In order to rebut this presumption and avoid liability, the carrier (as the last custodian) must show that the loss or damage did not occur while in its custody. A carrier removing goods from a NTS contractor's storage facility without inventorying it (or preparing a rider or exception sheet), will be presumed liable for any damage.

In this case, the DOHA adjudicator found that the record contained insufficient evidence to establish that the missing items were tendered to Ocean-Air. The adjudicator found that the carrier had successfully rebutted liability for the missing assembly parts because these items were not listed on the descriptive inventory for the shipment, there was no statement from the member addressing tender of the items, and the carrier prepared a rider. In its request for reconsideration,

the Navy has not presented any evidence to show that the missing items were tendered to Ocean-Air.

When Ocean-Air picked up the household goods from the warehouse, the inventory reflected weight bench parts, weights and weight set. There was nothing on the inventory reflecting assembly hardware and parts required for a crossover pulley, lat machine and multi-purpose bench. In addition, Ocean-Air prepared a rider that specifically noted that it was not responsible for hardware or reassembly. Although the member provided documentation that these items had been discontinued and that replacement parts were not readily available, this does not constitute substantive evidence of his tender of the items to the carrier. *See* DOHA Claims Case No. 07032809 (March 29, 2007) and DOHA Claims Case No. 00091204 (September 21, 2000). Therefore, we conclude it was reasonable for the adjudicator to find no evidence of tender of the claimed missing items to Ocean-Air.

We see no language in the Tender of Service requiring a carrier picking up items from NTS to reassemble the items in order to avoid liability. Also, there is nothing in the record to indicate that Ocean-Air is the same entity as the NTS contractor. We note that the Navy may be able to pursue recovery from the NTS contractor since they were the last handler of the missing items.

Conclusion

The Navy's request for reconsideration is denied, and we affirm the March 28, 2007, appeal decision in DOHA Claim No. 07020902. In accordance with DoD Instruction 1340.21,

¶ E7.15.2 this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin,

Acting Chairman, Claims Appeals Board

Signed: William S. Fields

William S. Fields

Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom

Member, Claims Appeals Board

