KEYWORDS: carrier/contractor liability; inspection rights; salvage rights

DIGEST: 1. A 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 of the 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 damages. 2. Under the Military-Industry Memorandum of Understanding on Salvage, effective April 1, 1989, a carrier will not exercise its salvage rights when any single item is less than $50, or when the item is hazardous or dangerous to the health or safety of the member's family unless it is an antique, figurine or crystal. For an individual item which has a depreciated replacement value of less than $50, the carrier will receive no credit for salvage. 3. A carrier is liable for damage to an item when the damage claimed at delivery is different from the damage documented on the inventory at origin.

CASENO: 07050108

DATE: 5/8/2007

DATE: May 8, 2007

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| In Re:<br>American Eagle Van Lines, Inc.<br><br><br>Claimant | Claims Case No. 07050108 |

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

**DIGEST**

1. A 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 of the 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 damages.

2. Under the Military-Industry Memorandum of Understanding on Salvage, effective April 1, 1989, a carrier will not exercise its salvage rights when any single item is less than $50, or when the item is hazardous or dangerous to the health or safety of the member's family unless it is an antique, figurine or crystal. For an individual item which has a depreciated replacement value of less than $50, the carrier will receive no credit for salvage.

3. A carrier is liable for damage to an item when the damage claimed at delivery is different from the damage documented on the inventory at origin.

**DECISION**

American Eagle Van Lines, Inc., requests reconsideration of the April 5, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims No. 07021602.

**Background**

The record shows that the carrier picked up the household goods shipment in Pensacola, Florida, on January 30, 2003, and delivered it to Kingsville, Texas, on February 18, 2003. The member reported damage to various items on a *Joint Statement of Loss or Damage at Delivery* (DD Form 1840), and noted further damage on a *Notice of Loss and Damage* (DD Form 1840R), which was dispatched on April 22, 2003.

The record indicates that on June 21, 2003, the carrier arranged for an inspection of the damaged items. However, the member had disposed of two of the items claimed as damaged prior to inspection: an Italian ceramic dish and a ceramic sun. The carrier's inspector did note two slight pressure cracks on a surfboard, "possibly pre-existing," and recommended no allowance. On the 1840R, the member noted damage to the surfboard as crushed on the edge. On June 1, 2005, the Carrier Recovery Branch of the Department of the Navy set-off $1,931.24 against the carrier.

On appeal to our Office, the carrier denied liability for these items: the ceramic dish, ceramic sun and the surfboard. The carrier asserted that it was not liable for the ceramic dish and sun because they were discarded prior to its inspection. The carrier asserted that it was not liable

for the surfboard because the damage noted by the inspector differed from the damage claimed by the member.

Our Office subsequently denied American's appeal of the Navy's set-off for these damaged items. In its request for reconsideration, American continues to deny liability for the ceramic dish and sun. American states that the member knew on May 29, 2003, when he signed instructions on how to file a claim that he was supposed to retain items for inspection. American states that since no pictures were taken of these items, the only way it could have verified the damage was through an inspection. In addition, American notes that a "full unpack" of the shipment was accomplished. Therefore, American contends that the damage to the dish and sun should have been annotated at delivery on the DD Form 1840. American also states that the Memorandum on Salvage indicates that they should have received a salvage credit of 25 percent of the items' depreciated replacement value. American also continues to deny liability for the surfboard. American states that the inspector indicated that the claim for damage to the surfboard should be denied. American asserts that the terms "scratched" and "a slight pressure crack" could be the same damage.

**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 R.R. v. Elmore & Stahl, 377 U.S. 134, 138* (1964).

Under the Military-Industry Memorandum of Understanding on Loss and Damage Rules (MOU), effective January 1, 1992, when the loss or damage is not reported at delivery, a notice of later discovered loss or damage (usually the DD Form 1840R) dispatched to the carrier not later than 75 days following delivery will be accepted by the carrier as overcoming the presumption of the correctness of the delivery receipt. *See* DOHA Claims Case No. 07020201 (February 8, 2007); and DOHA Claims Case No. 96070217 (November 19, 1996). 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, which ever is later. However, the carrier cannot avoid being *prima facie* liable for loss or damage merely because the circumstances prevent it from inspection. *See* DOHA Claims Case No. 07020201, *supra*; and B-260769, Nov. 1, 1995. 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); and B-260769, *supra*.

In this case, on the 1840R, which was dispatched on April 22, 2003, the member noted

"broken, not repairable," for both the ceramic dish and ceramic sun. The inspection report submitted by American indicates that the inspection was completed on July 21, 2003. This was more than 75 days from the date of delivery (February 18, 2003) and 45 days from date of dispatch of the DD Form 1840R (April 22, 2003). There is no evidence that American aggressively pursued its rights to inspection under the MOU. Even if American had exercised its inspection rights within the period stated in the MOU, there is nothing to indicate that American would have had a substantial defense which would overcome the *prima facie* case of liability if the dish and sun had been retained for inspection. According to the descriptive inventory, both the dish and sun had been carrier packed. Presumably, the carrier would not have packed a broken ceramic dish or broken ceramic sun. If the dish and sun had been broken prior to tender, in order to avoid liability, the carrier should have noted exceptions on the inventory. Therefore, for these reasons, the DOHA adjudicator reasonably concluded that the disposal of these items prior to inspection did not preclude the carrier from a substantial defense involving facts discoverable by inspection.

The carrier's right to salvage is provided by the Military-Industry Memorandum of Understanding on Salvage, effective April 1, 1989. Under the MOU, the carrier will not exercise its salvage rights when any single item is less than $50.00, or when the item is hazardous or dangerous to the health or safety of the member's family unless it is an antique, figurine or crystal. For an individual item which has a depreciated replacement value of less than $50, the carrier will receive no credit for salvage. *See* DOHA Claims Case No. 02021401 (March 6, 2002); DOHA Claims Case No. 99111907 (January 28, 2000); and DOHA Claims Case No. 98022313 (March 5, 1998). Our review of the Property and Claims Analysis Chart, DD Form 1844, Block 9, confirms that the value of the ceramic sun was $30 (which is less than $50). The carrier is not entitled to salvage and not due any salvage credit for this item. The DD Form 1844 reflects that the value of the ceramic dish was $75.[1] In its administrative report the Navy indicates that the carrier was given a salvage credit of $18.75 for the ceramic dish (25% credit for this item). Therefore, the DOHA adjudicator was correct in her analysis that the carrier was due no further credit for these items.

American asserts that there was no new damage to the surfboard at delivery. However, the surfboard is reflected on the inventory as scratched and rubbed. The member noted on the DD Form 1840R that the surfboard was crushed on the edge. American's only factual evidence is the statement on the inspection report noting "2 slight pressure cracks. Possibly pre-existing," and the recommendation of no allowance for the surfboard. However, as the DOHA adjudicator pointed out, "2 slight pressure cracks," is new and different damage than scratched and rubbed, and no exception for cracks was taken on the inventory. Therefore, the DOHA adjudicator had a reasonable basis to conclude that there was evidence of new transit-related damage to the surfboard because the damage at delivery was different that the damage documented on the inventory at origin.

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[1]For any claim containing a salvageable item of $50 or more, the carrier will receive credit for 25 percent of the item's depreciated replacement value.

## Conclusion

For the reasons stated, the request for reconsideration is denied, and the appeal decision is sustained. 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: Michael D. Hipple

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Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom
Member, Claims Appeals Board