

KEYWORDS; carrier/contractor liability

DIGEST: 1. When loss is not reported at delivery, a notice of later-discovered loss (usually the DD Form 1840R) timely dispatched to the carrier following delivery shall be accepted by the carrier as overcoming the presumption of correctness of the delivery receipt. 2. A carrier may be liable when the record shows that upon delivery an item is more damaged or damaged in a different way than the described pre-existing damage. 3. A carrier can be held liable for loss of an item when the inventory refers to this item and the notice of loss or damage refers to the same item, even though the inventory number cited on the notice of loss or damage is inconsistent with the number for the item in the inventory.

CASENO: 08053001

DATE: 6/13/2008

DATE: June 13, 2008

In Re:)	
Patriot Forwarders, Inc.)	
)	Claims Case No. 08053001
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

1. When loss is not reported at delivery, a notice of later-discovered loss (usually the DD Form 1840R) timely dispatched to the carrier following delivery shall be accepted by the carrier as overcoming the presumption of correctness of the delivery receipt.

2. A carrier may be liable when the record shows that upon delivery an item is more damaged or damaged in a different way than the described pre-existing damage.

3. A carrier can be held liable for loss of an item when the inventory refers to this item and the notice of loss or damage refers to the same item, even though the inventory number cited on the notice of loss or damage is inconsistent with the number for the item in the inventory.

DECISION

Patriot Forwarders, Inc., (Patriot) requests reconsideration of the April 29, 2008, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08041102 which held the carrier liable for transit loss and damage to a service member's household goods.¹

Background

The shipment was picked up on August 3, 2005, in Great Lakes, Illinois, and delivered on August 19, 2005, to Newport News, Virginia. On the Notice of Loss or Damage (DD Form 1840R), the shipper reported as missing items #7 (DVDs), #43 (clothes), #57 (stroller), #110 (clothes), #177 (garden tools), #148 (garage items) and #6 (child's chair). The member also claimed item #27 (dresser/changing table) as damaged. The carrier denied liability for items #7, #43, #57, #110, #177 and #148 based on its assertion that the member's wife initialed the inventory as having received these items at delivery. The carrier denied liability for item #27 based on its contention that there is no evidence that the damage was transit-related. The carrier denied liability for loss of the child's chair (item #6) because the item number listed on the DD Form 1840R was inconsistent with the item number listed on the inventory.

DOHA's appeal decision determined that the Navy had established a *prima facie* case of liability against the carrier. DOHA found no evidence in the record that the member's wife initialed the inventory as having received the lost items at delivery. In its request for reconsideration, the carrier contends that the member's wife did initial the inventory as having received these items. The carrier attaches a copy of the inventory reflecting the member's wife's initials for the disputed items. Patriot continues to deny liability for the child chair, alleging there is no evidence of tender. Patriot denies liability for the dresser/changing table on the basis that there is no evidence that they or their agent caused the damage. Finally, Patriot also requests that \$80.10 be returned to them because the last letter from the Navy states that their liability remained at \$4,580.84, but \$4,660.85 was set off against them.² Patriot states that if this amount was not interest, then the Navy erred, and they are entitled to a refund.

¹This matter involves Government Bill of Lading (GBL) ZX-008846, and Navy Claim No. 0700600.

²The difference between \$4,660.85 and \$4,580.84 is actually \$80.01.

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.

When loss or damage is not reported at delivery, a notice of later-discovered loss or damage dispatched to the carrier not later than 75 days following delivery shall be accepted by the carrier as overcoming the presumption of the correctness of the delivery receipt. See DOHA Claims Case No. 05081805 (August 31, 2005).³ A carrier may offer proof that the shipper received the items shipped despite a timely, contrary DD Form 1840R, but the carrier must prove delivery by clear and convincing evidence. See DOHA Claims Case No. 04041302 (April 21, 2004), *aff'd* by DoD Deputy General Counsel (Fiscal) on June 25, 2004; DOHA Claims Case No. 97123103 (January 28, 1998); and 57 Comp. Gen. 415, 419 (1978). In this case, the record evidence contains two inventory lists for the member's shipment, a 7-page inventory and a 6-page inventory. Neither inventory had initials next to the items subsequently listed as lost on the DD Form 1840R. On the 7-page inventory, most item numbers have the initials "KB" written in the box labeled "Shipper Check Dest." However, items #7, #110, #148 and #177 do not have the initials written in the box. On the 6-page inventory, most items numbers have the initials "KB" written in the box labeled "Exceptions (if any) at Destination." However, items #43 and #57 are not initialed. The 1840R listed these items as missing and was timely dispatched to the carrier.

Patriot submits copies of the 7-page inventory and the 6-page inventory with the initials "KB" listed next to every item number on the far left-side to support its assertion that the shipper received the items claimed as lost. Patriot argues that there is no evidence that the member or his wife was questioned as to why these items were initialed as being received on the day of delivery and later claimed to be missing. Generally, we will not review a claim based on new material facts that were not presented until the claimant requested reconsideration. See DOHA Claims Case No. 04041302, *supra*.⁴ If Patriot had timely submitted its version of the inventories to the Navy, the Navy would have had the opportunity to respond to the discrepancy between the two versions of the inventories. In any event, we find that Patriot has not demonstrated by clear and convincing evidence that it delivered the missing items. The location of the initials and the fact that every item was initialed on Patriot's version of the inventories tend to make them less

³The Military-Industry Memorandum of Understanding on Loss and Damage Rules, paragraph I(A), January 1, 1992, states: "The carrier shall accept written documentation on the DD Form 1840R, dispatched within 75 calendar days of delivery to the address listed in block 9 on the DD Form 1840, as overcoming the presumption of correctness of the delivery receipt."

⁴See also Department of Defense Instruction 1340.21, ¶ E5,7 (32 C.F.R. 282, Appendix C(g)): All relevant evidence to prove the claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered.

credible, especially in comparison to the inventories contained in the record and relied on by the Navy and DOHA adjudicators. *Cf* DOHA Claims Case No. 96070223 (April 14, 1997) (the presumption that items reported as missing within 75 days of delivery were lost in the hands of the carrier applies even when the shipper has initialed every item on the inventory). Patriot has not included any further documentation such as a statement from the driver or representative at delivery concerning knowledge of the circumstances surrounding the member's or his wife's initialing of the items. The Navy presented a *prima facie* case, and Patriot has not presented sufficient evidence to rebut its liability. In the absence of clear and convincing contrary evidence, on disputed questions of fact between the claimant and an administrative officer, we accept the statement of fact furnished by the administrative office. *See* DOHA Claims Case No. 05021501 (March 3, 2005).

The pre-existing damage (PED) for the baby changer described it as scratched top, bottom, side, edge, corner and chipped corner edge. On the DD Form 1840R, the member reported that the bottom of the baby changer was broken off. The carrier's inspector reported the damage to the changer as the bottom broken off. The carrier's inspector also indicated that big holes were drilled in the changer. Therefore, there is substantial evidence of new, transit-related damage.

Patriot argues that there is no evidence of tender of the missing child's chair. As for the differing item numbers appearing on the DD Form 1840 and the inventory, a carrier can be charged with loss or damage even when incorrect item numbers are listed on the notice of loss or damage. *See* DOHA Claims Case No. 05011301 (February 10, 2005); DOHA 03120201 (December 9, 2003); and DOHA Claims Case No. 02012301 (February 4, 2002). The notice of loss or damage is adequate as long as it is in writing, timely and sufficient in content to alert the carrier that there may be a claim for loss or damage and that the carrier should investigate the circumstances surrounding the loss or damage. At delivery, the loss was promptly noted on the DD Form 1840 as missing "chair kids." The inventories listed various chairs including kids chairs. We find that Patriot was given sufficient facts to investigate the loss.

Regarding an apparent discrepancy of \$80.01, the carrier should consult with the service to verify the proper amount of setoff.

Conclusion

The carrier's request for reconsideration is denied, and we affirm the appeal decision. In accordance with DoD Instruction 1340.21, ¶ E7.15.2 (32 C.F.R. 282, Appendix E(o)(2)), this is the final administrative action of the Department of Defense 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