KEYWORDS: carrier/contractor liability; collateral source; insurance coverage

DIGEST: 1. The burden of establishing fraud rests upon the party alleging it, and must be proven by evidence sufficient to overcome the presumption of honesty and fair dealing.

2. A household goods carrier does not otherwise avoid or reduce its liability for transit loss or damage under the Personal Property Government Bill of Lading by merely asserting, without proof, that the member/shipper had a duty to advise it of his insurance coverage and/or of his claim against the insurer for the same loss or damage claimed against the carrier.

3. Absent a contractual agreement to the contrary, a household goods carrier cannot avoid or reduce its liability for transit damage based on sums paid to a shipper by a non-tortfeasor, collateral source, acting as an insurer to the shipper, for transit damage claimed by the shipper.

CASENO: 08080404

DATE: 8/11/2008

DATE: August 11, 2008

In Re:	)	
Stevens Forwarders, Inc.	)	Claims Case No. 08080404
Claimant	)	

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

1. The burden of establishing fraud rests upon the party alleging it, and must be proven by evidence sufficient to overcome the presumption of honesty and fair dealing.

2. A household goods carrier does not otherwise avoid or reduce its liability for transit

loss or damage under the Personal Property Government Bill of Lading by merely asserting, without proof, that the member/shipper had a duty to advise it of his insurance coverage and/or of his claim against the insurer for the same loss or damage claimed against the carrier.

3. Absent a contractual agreement to the contrary, a household goods carrier cannot avoid or reduce its liability for transit damage based on sums paid to a shipper by a non-tortfeasor, collateral source, acting as an insurer to the shipper, for transit damage claimed by the shipper.

DECISION

Stevens Forwarders, Inc. (Stevens) requests reconsideration of the July 7, 2008, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08060203. After a lengthy adjudication process, the Air Force found Stevens liable in the amount of $9,011[1] for transit loss and damage to a shipment of household goods of a service member.[2] DOHA affirmed the Air Force's initial determination of liability except that it allowed Stevens an additional credit of approximately $2,000 because there was no proof of liability on some articles in Descriptive Inventory Item 18. The Air Force has not requested reconsideration of this aspect of the appeal decision, and it is not at issue here. The issue on reconsideration involves Stevens' claim that it is not liable for the balance of the $9,011 liability because the service member who had shipped the household goods had defrauded Stevens by failing to reveal to Stevens that he had also filed a claim for the same items with his household insurer. In the appeal decision, DOHA's adjudicators concluded that no fraud existed.

Background

In relevant part, the household goods were tendered to Stevens' agent in Illinois in July 2001, and were delivered to the member in California in August 2001. Loss and damage was timely reported and claimed. Item 27 of the PPGBL indicates that the member, as shipper in this case, requested full replacement coverage (FRC).[3] In its administrative report, the Air Force explains that the member claimed damages under his homeowners or renters insurance policy while claiming loss or damage against Stevens for many of the same items. The Air Force suggests that there were no contractual arrangements between the government and the industry at

---

[1]This was the final amount of Stevens liability as determined by the Air Force prior to referring this matter to DOHA. Stevens' correspondence continued to refer to a claim of $9,121.30. We cannot determine if Stevens ever received a refund for the $110.30 allowance representing the difference between the two amounts.

[2]The household goods involved Personal Property Government Bill of Lading (PPGBL) JP-016,227; USAF Claim No. 04-121 (Edwards AFB); and Stevens Claim No. 01-69686.

[3]The shipment was released at full replacement protection of $3.50 times the net weight in pounds of the shipment or $21,000, whichever was greater.

the time of the move that specifically addressed the processing of claims against a carrier when the shipper had both full replacement protection under the PPGBL and insurance coverage.[4]

The practice within the Air Force has been to advise a member in such circumstances to file a claim against the carrier for everything that was timely reported as lost or damaged, even though the member also files a claim with his insurer. The reason for this is based on the carrier's primary responsibility for transit loss and damage, and the possibility of the loss of a right given to the member in the PPGBL if he fails to timely file his claim with the carrier. It was anticipated that the insurance company was subrogated to the rights of the member, and the member would have to account to the government and to his insurer to the extent that his total recovery exceeded his actual loss. The Air Force also explains that at the time of the move, a member of the carrier industry had no right to ask if the shipper had insurance or to require the shipper to seek recovery through an insurer. The Air Force specifically found that no double payments occurred in this claim and there was no fraud.

Stevens appears to be particularly disturbed about the possibility of a member/shipper collecting from both the insurer and the carrier on amounts other than the member's deductible and anything held back by the insurer. However, as the Air Force explains, even for recovery beyond the deductible and holdback, the Military Claims Office would have required the member to reimburse the insurer (or government) to the extent that the member recovered, in total, more than he lost. The Air Force found here that there was no evidence that Stevens had asked the member for insurance information during his negotiations with it over the loss and damage. According to the Air Force, after Stevens failed to offer proof that it had asked for such information, Stevens simply asserted that the member had an obligation not to seek recovery from the carrier where the insurer had settled with him. The Air Force contends that Stevens failed to establish that the shipper here had an obligation, in law or in fact, not to claim items for which he settled with his insurance company.

Discussion

An allegation of fraud is a serious matter. It contains an innuendo that the person engaged in the fraud lacks moral turpitude and is possibly involved in felonious criminal activity. There is some variation in definition depending on jurisdiction and purpose, but for the purpose of this discussion, we will accept the common law formulation in Black's Law Dictionary: a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. *See* Black's Law Dictionary (8th ed. 2004). Furthermore, as explained in the appeal decision, the burden of establishing fraud rests upon the party alleging it, and must be proven by evidence sufficient to overcome the presumption of honesty and fair dealing. *See* DOHA Claims Case No. 03100615 (October 20, 2003). We understand that Stevens' representatives feel strongly about the company's position and the protection of its assets, but we

[4]Our research indicates that Domestic Personal Property Rate Solicitation D-6 (hereafter Rate Solicitation D-6) was in effect at the time of the move, and it did not specifically address this issue.

have to analyze its claim based on whatever record evidence and legal analysis it offers to support its position. There are significant problems with Stevens' claim.

First, Stevens failed to lay a proper foundation for its position. The situation here is not unusual. Frequently, a member will have insurance coverage for items that are transported and lost or damaged by a carrier. Under the Carmack Amendment, a motor carrier is liable, with certain exceptions not applicable here, for loss or damage to the goods they transport. *See* 49 U.S.C. § 14706(a)(1). In effect, Stevens seeks to limit its liability to the extent that collections are made by the member from his insurance company for the same transit damage that he is claiming against Stevens. But as the Air Force notes, there is no basis in law or fact to do so. Generally a household goods carrier may limit its liability under 49 U.S.C. § 14706(f) by written declaration of the shipper or by written agreement.[5] In this case, the member and Department of Defense requested full replacement protection in the PPGBL. Other terms and conditions of the contractual agreement were contained in Rate Solicitation D-6. *See particularly* Items 306 (limitation of carrier liability) and 416 (full replacement protection). Our review of Rate Solicitation D-6 fails to show any limitation on carrier liability when the member is reimbursed by his insurer for the same damage as claimed against the carrier. Stevens offers nothing that would indicate that Rate Solicitation D-6, or any other aspect of the contract of carriage, limits its liability in this manner.

Moreover, the Federal courts have recognized that a household goods carrier cannot seek a reduction in its liability based upon compensation to a shipper from a "collateral source;" *i.e.*, a non-tortfeasor third party acting as an insurer (*e.g.*, the government or an insurance company). *See Ward v. Allied Van Lines, Inc.*, 231 F. 3d 135, 139 (4th Cir. 2000), (citing and distinguishing *Anton v. Greyhound Van Lines, Inc.,* 591 F. 2d 103 (1st Cir. 1978)(overruled on other grounds)).

Furthermore, in Department of Defense sponsored household goods movements, there is a well-established history of recovery by members/shippers under their insurance policies while also pursuing their rights directly, or through the government, against the carrier. The government will make sure that a third party insurer and the government, which are subrogated to the member's claim against the carrier, do not reimburse the member more than his actual damages after recovering from the carrier as much as is permitted by the contract of carriage. But, in the absence of contractual provisions to the contrary, the carrier is primarily liable for transit loss and damage. *Compare* the Comptroller General's decisions in B-252197, n.2, Jun. 11, 1993 and B-235558.6, n.2, Jul. 5, 1991.

---

[5]49 U.S.C. § 14706(f) provided that a household goods carrier may petition the Surface Transportation Board to modify, eliminate, or establish rates for transportation of such goods under which a carrier's liability would be limited. However, 49 U.S.C. § 13712 anticipated separate agreements between the government and members of the industry, which obviated the need to petition the Board, when a carrier offers free service or service at a "rate reduced from the applicable commercial rate" to the United States government. Such agreements can be quite comprehensive, as evidenced in Rate Solicitation D-13 for traffic moving on or after November 1, 2007, which made significant revisions in carrier liability and shipper rights with the implementation of the Full Replacement Value program.

Second, as to the allegation of fraud, Stevens offered no explanation for the basis of its belief that the member had a duty to advise Stevens that he had insurance or that he had filed an insurance claim for the same lost or damaged items that are in his claim against Stevens. The record indicates that the Air Force had a reasonable basis to find that there was no evidence that Stevens had asked the member for insurance information during his negotiations with Stevens, and in the absence of clear and convincing contrary evidence, which Stevens failed to provide, we accept this finding. *See* the Comptroller General's decision in 57 Comp. Gen. 415, 419 (1978). And even if we assume that the member did not advise Stevens of the insurance when Stevens requested such information, for the reasons stated above, Stevens offered nothing to demonstrate the legal detriment it suffered, because it was still liable to the member for the full amount of its liability under the contract of carriage.

In summary, Stevens's position assumes, without proof, that the member had a duty to advise it of his insurance and that it was not liable to the extent that the member was covered by insurance. These assumptions result in a baseless allegation of fraud.

Conclusion

Stevens' request for reconsideration is denied, and for the reasons stated herein, we affirm the July 7, 2008, appeal decision. 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

_____

Michael D. Hipple
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